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Brief of De Gray for Petitioner

SUPREME COURT

Filed Sept. 20, 1898.

OF THE UNITED STATES.

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JAMES H. McKENNEY,
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ANDERS JAKOBSEN,
Claimant of the Norwegean steamship Albert Dumois,
Appellant,

vs.

OSCAR M. SPRINGER, et al,
Appellees.

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Appellant.

vs.

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claimant, et ale,
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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

RICHARD DEGRAY,
Proctor for Petitioner.

DETROIT:
CHAS. M. ROUSSEAU & SONS, PRINTERS, 40-44 WEST LARNED STREET.
1898.

SUPREME COURT

OF THE UNITED STATES.

Brief in support of petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit, to bring before said Supreme Court the case entitled, in said United States Circuit Court of Appeals, as follows:

ANDERS JAKOBSEN,
Claimant of the Norwegean steamship Albert Dumois,
Appellant,

vs.

OSCAR M. SPRINGER, et als,
Appellees.

OSCAR M. SPRINGER,
Appellant,

vs.

ANDERS JAKOBSEN,
claimant, et als,
Appellees.

STATEMENT.

The issues of law and fact in this case are so fully stated in the petition herein praying for the issuance of said writ of certiorari,—the latter in the substance of claimants amended petition praying for the benefit of the limited liability acts of Congress, and libellants

answer thereto, given at the end of said petition for certiorari and made part thereof, that we will not here repeat them, but will at once proceed to a consideration of said issues, and in doing so will first ask attention to matters of law, and then to matters of fact.

ARGUMENT AS TO MATTERS OF LAW.

Conceding for the sake of argument, that both vessels were in fault in causing the collision (which of course we deny) both having been surrendered under the limited liability provisions of the Revised Statutes of the United States, can the principal and surety on the bond, given for the release of the Dumois and her pending freight, correctly, be permitted to deduct half the amounts they are decreed to pay Mrs. Hester and Mrs Blesine from the amount decreed as half the damages sustained by Springer, owner of the Argo?

It is too well settled to require the citation of authority, that in a case of collision of vessels, and a proper surrender of the property in fault, the personal liability of the owner is confined to the property surrendered at the *end* of the voyage, and any recovery that may be had, to what ever may be realized from said property so surrendered.

The law in this country and in England on this subject is entirely different. There the owners liability is confined to the value of the property just before the disaster, here it is confined to the value of the property after the disaster. In the case of the Benefactor, 103 U. S. p. 246 the court said:—

"In England, the value of the vessel immediately before the collision was regarded as the true criterion of liability. But the English law is different from ours. It makes the owners liable to the extent of the value of the ship at the time of the injury even though the ship itself be lost or destroyed at the time; whereas our law follows the admiralty rule, limits the liability to the value of the ship and freight after injury occurred; ~~so that if the ship and freight after injury occurred~~; so that if the ship is destroyed the liability is gone; and whether damaged or not damaged, the owners may surrender her in discharge of their liability."

In The City of Norwich 118 U. S. p. 490, the court said:

"We held in Norwich vs. Wright, and we have held and decided in many cases since, that the Act of Congress adopted the rule of the admiralty law as distinguished from that of the English law on this subject; that the value of the vessel and freight after, and not before the collision is to be taken."

And in the case of The City of Norwich 118 U. S., p. 468, and in The Great Western 118 U. S., p. 520, it was decided the owner, claiming the benefit of the limited liability law, need not surrender a policy of insurance upon the vessel surrendered, or monies collected thereon; that the same did not enure to the benefit of parties who may have suffered by the disaster. And the reason is most apparent, viz., because the owner's liability is confined to the value of the wreck, after, and not before the collision, and as it lay sunk at the bottom of the sea or river. In the language of the court in said City of Norwich 118 U. S., p. 492:

"The proper value of the steamer was taken in the court below, namely, the value which she had when she

had sunk, and was lying on the bottom of the sea. This was the termination of the voyage."

Hence, if the vessel is a total loss and nothing is recovered from the wreck, there can be no recovery by those who have suffered by the disaster.

The application of this law to this case is this. There is no personal liability on the part of Springer, because he has surrendered the wreck of the Argo and all claim for freight; and there can be no recovery therefrom, because there was no freight due, and the vessel was a total loss from which nothing can be recovered. There is no personal liability on the part of Jakobsen, the owner of the Dumois, because he has surrendered her and her pending freight and given bond for the appraised value thereof, to-wit, $31,333.73, and costs, making a total of $32,500 (R. p. 18), and this is the only liability in the case. How then could the Court of Appeals, rightfully, decree that the Dumois, being condemned to pay full damages to Mrs. Hester and Mrs. Blesine from the above bond, decree that the principal and surety on said bond could deduct one-half of what they were condemned to pay said Mrs. Hester and Mrs. Blesine, from the amount they owed Springer? Certain it is, that Mrs. Hester and Mrs. Blesine could not recover the whole, or half, or any part of the damages they might have suffered, from Springer (even though the Argo might have been in fault), because he has surrendered the wreck and claim for freight, and because he was not obliged to surrender his suit for damages to secure the benefit of the limited liability provided by law, and for the reason that his suit for damages is a claim for the value of the Argo as she existed before the collision, and

not after she was sunk on the bottom of the river. Nor could Mrs. Hester or Mrs. Blesine recover anything from the wreck of the Argo, because it has no value. In fact there can be no recovery in this case by anyone, except from the bond given for the surrender of the Dumois. Yet under the decision of the lower court, Springer's property (one-half the value of the Argo, less half the damages sustained by the Dumois in the collision, and no part of which—as above stated—he was obliged to surrender, is taken from him to pay part of a debt which he does not owe because of said surrender, and which said bondsmen do owe. In other words, the damages sustained by the Dumois in this collision was $185.00, and if she and said Argo were both in fault, one-half of this amount is all the Argo (Springer) would owe the Dumois (Jakobsen), and the balance of the half of the damages sustained by the Argo are the property of her owner, Springer, half of which the decree wrongfully takes from him and hands over to the Dumois bondsmen to reimburse them in part, a debt which the Dumois alone owes.

It is true it was decided in the case of the North Star 106 U. S., p. 17, a case of collision where both vessels were in fault, and one was lost and her wreck was surrendered, that the owner of the lost vessel could only recover one-half of his damages, and the evident reason was, that, both being in fault the surviving vessel only owed half the damages. But that was a case solely between owners of colliding vessels, both in fault, and it has never been decided that the owner of one vessel can take from the owner of the other vessel one half of what the former has to pay to a third innocent person, and

we apprehend it will never be so decided, and for the reason that the surrender of the sunken wreck on the bottom of the river, from which no realization can be made, absolutely put an end to all liability of the owner of the property surrendered. Surely the contrary would be destructive of the law that the liability of owners of vessels is confined to the value of the property surrendered at the end of the voyage.

We are also aware of the fact that it was decided in the collision case of The Washington and The Gregory, 9 Wall. — and in other cases since, that both vessels being in fault in causing damages to an innocent party, both were liable, and that the damages should be equally apportioned, with the right reserved to the libellant to collect the entire amount from either in case of inability of the other to respond, but that was not in any sense this case, and is no authority for the party who has paid full damages to recover back from the co-wrongdoer half the amount so paid, or to detain it out of what he may owe such party, and certainly is not an authority, when the debt so paid in full could not be collected in whole or in part from the first party. In that, and in the other cases where that case was followed there was no surrender of the offending vessel, and the doctrine of the limited liability provided by Congress was not invoked, discussed or passed upon.

Again. The decision of the Court of Appeals is in effect, that one wrong-doer can recover from his co-wrongdoer, one half of what he has been compelled to pay. This is not the law.

In Addison on Torts, (edition of 1891) p. 21, the law on this subject is stated as follows:

"No contribution can be claimed, as between joint wrong-doers. If therefore, a plaintiff, who has recovered a judgment against two defendants for a joint trespass, levies the whole damages on one of them, that one has no claim for a moiety of the damages from the other."

And surely, if he cannot recover it, he cannot detain it from what he owes, and especially not in this case, for the officer and the pilot of the Dumois are presumed to have known the law and that her movement to port with a starboard helm was in violation of the Act of Congress and the Regulations of the Board of Supervising Inspectors of Steam Vessels, and would in all probability produce a collision, if the pilot of the other vessel obeyed that law, as he did.

Another question of law in this case is, can the decree of the Circuit Court of Appeals, in the absence of any findings of fact and conclusions of law based on said facts, by the District Court, be sustained? In other words is there anything which the Cour of Appeals can review?

This question was discussed by Mr. Justice Brewer, presiding at the Circuit Court of Appeals for the Eighth Circuit, in the case of the Pioneer Fuel Co. vs. McBier et als., 84 Fed. Rep., p. 495, and we submit the point upon the discussion there had.

ARGUMENT AS TO MATTERS OF FACT.

Two questions will be here considered, to-wit: those that relate to the fault of the collision, and, second, those that relate to the value of the Argo.

First, who was at fault in causing said collision? In discussing this question it will be necessary to ascertain

where the vessels were in the river when they first came in sight of each other, what they respectively did to avoid coming together, and where they were in the river when they did collide. And in doing so, we will give the evidence on each side, and also notice what we think are errors in the opinion of the Court of Appeals.

At the outset it is proper to remark, that all of the witnesses when speaking of distances up and down the river, speak of them as they appeared in the night time, when the estimates, at best are mere guesses, and such guesses even when quickly made in broad day (and here they were quickly made in the night time) and without the assistanee of mile posts or other monuments, are of little value, and ever so much less when made in the night time. But these observations do not apply with equal force when witnesses are speaking of location (and not distances) between two known or given objects, where both such objects are in sight, and the point estimated, and from which the observation is made, is between two such known objects. For instance, a party might well be able to tell approximately, when on a vessel in the middle of the river, whether she was in the centre or not, because there are two objects—the banks of the river on each side—to guide and assist the judgment, while in looking ahead, the observer has no known objects to assist him, and as said before, any estimate of that kind is but a guess, and probably far from correct.

WHERE WERE THE VESSELS IN THE RIVER WHEN THEY FIRST CAME IN SIGHT OF EACH OTHER?

On the Argo, James Brown, her master and pilot, was on watch and at the wheel steering, and immediately alongside of him, and also on watch, at the time the Dumois lights were discovered, was his lookout, Desemus, while those on watch below were Orkney, the engineer; Broadhurst, the fireman, and Green, the cook, though not on watch was in the cabin and awake. Those not on watch and in their berths at the time of the collision and prior thereto, were Blesine, Hester, Lindauer and Cranz. The evidence of the above parties on the above point (except Hester and Blesine, who were drowned), and Cranz, who has not been called by either side, is as follows:

At page 48 Brown was asked and said as follows:

Q. Whereabout in the river were you when you first noticed the steamer which came in collision with you, where was your boat, in what part of the river? A. I was in the middle of the river.

Q. Were you going down stream? A. Yes, sir.

And at page 49 said:

Q. Over what bow of your vessel did you see? A. Over the port side of our bow.

Again at page 50, middle:

Q. In what part of the river were you when you first noticed him? A. In the middle of the river.

Q. Heading which way? A. Down stream.

And at page 53 he said:

Q. Well, how far away was the boat when you first saw her before you gave the signal? A. She was about three-fourths of a mile away. I guess about three-fourths of a mile the way I was going. I understand it now.

Yes, sir. I saw her some time before I blew the first whistle.

DESEMUS was asked, and said, at page 79, as follows:

Q. Where were you just before the collision occurred —on what part of your boat? A. I was with Captain Brown, standing by his side on the bridge that acted as the pilot house—it was above the pilot house.

Q. Did you pass any other boats before you came —before the collision occurred, a short time before? A. Yes, sir.

Q. What boats were they? A. I couldn't say the name, sir—there were some steamers, and I looked at the lights, one that I passed—there were some small craft with it.

Q. Where were they, on what part, what side of the river? A. On the east side, New Orleans side.

Q. Whereabout in the river were you when you passed these boats? A. I should judge in the center.

Q. What kind of a night was it? A. It was a clear night.

Q. Could you see the banks of the river without difficulty? A. You could see the trees, dark shade.

Q. When you passed this—you say you passed something on the left, east bank? A. Yes, sir; I thought it was the Day Dream or some of them small boats towing luggers.

Q. Did you give any signal to these boats? A. Yes, sir, I gave one—at least Captain Brown gave one to them.

Q. About that time did you notice any other lights anywhere, if so, where? A. Shortly after we passed the

last craft I saw the light, I was on the outlook, I saw a red and white light.

Q. You were on the outlook? A. Yes, sir.

Q. What bow of your boat did you see them over? A. I saw them on my left hand.

Q. Over your port bow? A. Yes, sir.

Q. Where was this red and white light that you saw in reference to the bank of the river—what bank was it on? A. On the New Orleans bank, on my port side.

Q. How far off was it when you first saw it? A. About three-fourths of a mile.

Q. Do you know whether Captain Brown saw it the same time that you did or about the same time? A. I think he did, because as soon as I saw them I said, Captain, there is a vessel coming; he said, yes; he waited a little while, I expected to hear the vessel blow, she didn't blow, so he blew one blast of his whistle.

The court says this witness was not on watch, or rather that Brown was the only man on watch at the time the vessels came in sight of each other (pp. 334 and 337), even conveying the idea that there was neither an engineer running the engines, or a fireman feeding the fires to make the steam to run them, but this is clearly wrong. Desemus was the deckhand on the Argo, and Brown was asked, and said, at page 49, as follows:

Q. Was any one on watch with you on deck? A. Yes, sir; the deckhand was right alongside.

And at page 57 said:

Q. Where was Deseamus? A. He was right alongside of me at the wheel; the wheel was abaft of the pilot house on deck; I was standing right up there.

Q. You had the wheel? A. Yes, sir; always,

Q. And Desemus was standing alongside of you? A. Yes, sir.

Q. How long had he been there? A. Off and on since we left; I kept him there in case I wanted to send him anywhere; he was lookout too. * * at page 66 said.

Q. At the time the collision occurred then, was there a full complement on watch in running the boat? A. Yes, sir; the lookout, and cook he was about; myself, engineer and fireman.

Q. Where was the lookout stationed? A. He was up on deck, on the upper deck along side of me. He was right up alongside of the wheel. (From which place he had the very best and an unobstucted view.)

And the above evidence, apart from being contradicted by no one is supported by Desemus himself, who after stating he was deck hand (p. 79) and telling how Captain Brown gave a signal to the Day Dream, was asked at page 80.

Q. About that time did you notice any other lights anywhere, and if so where? A. Shortly after we passed the last craft, I saw a light, I was on the lookout, I saw a red and white light.

Q. You were on the lookout? A. Yes, sir.

ORKNEY, the engineer's evidence on this subject, though not so direct is still clear, for just previous to the signal that preceded the colllsion he had come up from the engine room and looked out and saw lights of the tow (Day Dream) opposite the Argo on the opposite bank of the river. At page 69, middle, he states this matter as follows:

Q. When you came up, as you have stated, and looked out and saw the Day Dream, or the Day Dream's

tow? A. I saw a tow, I didn't know what vessel it was.

Q. How far were you from that tow with reference to the bank of the river—were you close into the side the Day Dream was, or on the opposite side, or in the midde? A. No, I guess we must have been in the middle, because we were so far away; I could make out it was a tow by the lights, but I didn't see the vessel at all.

Q. The night was clear? A. Yes, sir, it was a good night for seeing lights.

GREEN, the cook and steward, was asked and said, at page 100:

Q. Mr. Green, at the time you heard the cross signal and you looked out, could you tell in what part of the river the Argo was, whether she was in the middle of the river or whether she was near the eastern bank or near the western bank? A. She appeared to me to be in the middle of the stream, or might be, according to my idea, a little closer to the west bank than to the eastward. * * *

Q. You could see the banks? A. I could see either bank, I could see a long ways.

Q. Now after you got into the yawl boat and the Argo had sunk could you see the banks of the river then? A. Yes, sir; we were closer to the west bank than to the east bank (confirmed by the finding of the wreck 500 feet from the west bank), and we started for the west bank, it being the closest, to try to get there with the yawl boat.

This evidence the court also failed to heed or notice, and while it is true Green after hearing the cross signal of the Dumois and seeing her "apparently crossing the river" (Rec. p. 96) said he saw both signal lights when he

put his head out of the trunk, as he certainly could have done if she was there on a starboard helm, it is equally true he said the Argo was in the middle of the river, and had the Dumois not changed her course to show both signal lights to Green when he first looked out—his statement as to lights indicates that the Dumois was farther from the east bank than is claimed.

BROADHURST, the fireman, was in the fireroom and saw nothing until after the collision occurred.

Such is the evidence of those on board the Argo who made any observation on the position of the vessels prior to the collision.

On the Dumois it is claimed, that owing to the time for changing watches having arrived, and the ship having approached port, all four seamen and the carpenter were on deck (p. 264), one, Johnson, was on lookout, two were coiling up ropes on the forecastle, one, Larsen, took the wheel after the signals were crossed from Wessel (p. 302), yet only Larsen, who took the wheel from Wessel, the pilot, Lombard, and Sabitsin, the second mate, have been examined, and why the others, and especially Johnson, the lookout, and Wessel, the man at the wheel when the signals were crossed and the collision was imminent, and the carpenter have not been examined has not been satisfactorily explained.

It is true the master, Ruatad, at page 212, has tried to account for Johnson not being called, by saying he (Johnson) "wanted me to pay him to stay; he wanted me to bribe him to stay," but surely this is no excuse for not examining him de bene esse, if it is true he was about to go away, and prosecuting him if he swore falsely for perjury in the courts that are open as well to the

Norwegian as an American. But there is no excuse whatever for not calling Wessel, Neilsen, or the carpenter, all of whom could have thrown light on the facts of this case. Their not being called is a strong presumption that their evidence would not support the defense in this case, and would support the claim of the libellant.

LUMBARD, pilot of the Dumois, after stating she was 210 feet long (p. 239), that she was near the eastern bank a short distance below the New Canal—a quarter or a half mile—(p. 240) when he discovered the Argo's lights, was asked and said at page 241 as follows:

Q. What lights did you see at the canal, or near the canal? A. I saw a lot of bright lights—white lights.

Q. Did you see the side lights and white light of the Argo? A. I saw her red, green and white lights.

* * * * * *

Q. When you first discovered lights near the canal, what impression did it make on you? A. That she was one of the lugger boats, tugboats, making up a tow there.

Q. When did you become convinced that the vessel was descending? A. Not until after I had blown my two whistles and he answered me with one, when I was convinced she was coming down the river under way. * * * *

Q. Why did you blow two whistles? A. Well, because I wanted to let them know I was coming up and also thinking she was coming close along the bank I naturally gave her two whistles. I was out—

Q. How far were you from the east bank when you blew these two whistles? A. I should judge about a ship's length (210 feet).

Q. Where were those lights of the luggers at the new canal at the time? A. They were right at the canal, as near as I can judge.

Q. Did they appear to be dead ahead? A. After I hauled out they were a little inside, when I first sighted them, they were dead ahead.

Q. Why did you haul at that time? A. I hauled out to clear the luggers, and also the steamer that was there.

And at page 242 said:

Q. You say when you first discovered the lights of the Argo you were about a ship's length from the east bank of the Mississippi river? A. Yes, sir.

Q. State whether you saw all the lights of the Argo dead ahead or otherwise? A. They were dead ahead—if anything a little inside of us.

And at page 243 said:

Q. From seeing three lights on the Argo at the time you blew your two whistles, can you say where the Argo must have been or was in the river? A. She was close to the canal—close to the lugger landing.

Q. Close to which bank of the river? A. To the east bank of the river.

NICHOLAS SABITSIN, second mate of the Dumois, who claims he was on watch and on the bridge of the Dumois with Pilot Lumbard, places the Dumois double the distance (at one time 420, and another time 500 feet, p. 265) from the east bank, and the Argo dead ahead of her, when the vessels first came in sight of each other. He was asked and said at page 258 as follows:

Q. Where was the Dumois in the river at the time the lights of the Argo were first discovered? A. She was close to the east bank, very close. * * *

Q. How far was the Dumois from the Argo when you first saw her lights (p. 259)? A. I should judge about half a mile when we discovered it to be a steamer. * * *

Q. When you first saw the Argo's lights did you see all three at the same time? A. Yes, sir.

Q. State whether the Argo's lights were dead ahead when you first discovered them? A. Yes, sir, a little inside of us near the bank.

And at page 265, was asked and said:

Q. How close were you to the bank? A, I disremember, we were about a couple of ship's lengths from the bank.

Q. How long is the ship? A. About 200 feet.

Q. And this boat, this steamer's lights that you saw inside were closer to the bank than you were? A. Yes, sir. * * *

Q. Wasn't she, according to your notions, closer to the east bank than the luggers? A. No, sir, she was not—he was outside the luggers.

Q. The luggers had not made a landing in there yet, had they—they were turning in there to make a landing—they had not yet gotten to the bank? A. They got pretty close to the bank, closer than him—mostly in the bank.

And at page 274 was asked and said:

Q. You say you were coming up the east bank? * * * A. Yes, sir.

Q. Was it necessary for you to turn out into the

stream to pass the luggers? A. No, sir, I don't think that was just the thing for him to be close to the bank.

Q. And the Argo was closer into the bank than the luggers? A. No, sir.

Q. How far? A. She was farther out than they, nearer on.

Q. Nearer to your line? A. Yes, sir.

Q. What lights did you see? A. I saw all her lights; she was heading right at us.

Q. Suppose two ships are approaching each other half a mile distant, and you see all the lights, side lights and masthead lights, doesn't that indicate to you that you are meeting head on? A. Yes, sir.

Q. Then you saw the Argo approaching you head on? A. Yes, sir, mostly. * * *

Q. Those lights you saw, all three? A. Yes, sir.

Q. That indicated to you that you were coming head and head? A. Yes, sir.

And at page 275, he was asked and said:

Q. And you were about 500 feet from the bank or 600? A. Five hundred, I should think. * * *

Q. They (the luggers) would be 50 feet? A. Fifty feet, the two of them. * * *

And at page 276, was asked and said:

If you were coming 500 feet from the bank, and there were luggers 50 feet wide, that would leave about 450 feet.

Q. Don't you know there was 450 feet? A. I said about.

Q. Your judgment was as you stood on the bridge and looked up the river and saw these luggers on the bank of the river as you came up, that there would have

been about 450 feet of space between your ship and the luggers as you went up stream, that is if you had kept your course, right up? A. Yes, sir.

LARASEN, a steersmen on the Dumois, whom the court pronounces "an able seaman" (334), but who said he did not know "that when one boat blows two signals and the other boat blows one signal that indicates that the boats are about to come together" and who in fact did not know what cross signals were, and yet was put at the wheel in this position of the vessels in thc place of the man removed, was asked and said at page 297 as follows:

Q. How was the wheel of the Dumois at the time you relieved the other man? A. It was lying starboard.

Q. What was the course of the vessel at that time? A. We had no light in the binacle, we steered after the pilot's command and the vessel was swinging, turning, moving.

Q. Which way was she in relation to the banks of the river? A. She was swinging from the bank to port.

Q. From which bank of the river was the Dumois at this time, how far from it was she? A. It was the east bank I think they call it, I am not sure, it was the bank on the starboard side, about half a ship's length away.

Q. Did you see the lights on the approaching steamer? A. Yes, sir.

Q. When did you first see them? A. A minute or a minute and a half after I had taken the wheel.

Q. In what position was she approaching, was this approaching vessel at that time head on, or how was she

in what position did you have her when you first saw her? A. On the starboard.

Such is the evidence of those who were examined from the Dumois, and, in fact, all the evidence of the claimants on this point, except that of Nick Theodore, master of the tug Day Dream, (whose evidence will be noticed hereafter) who could not tell the width of the river anywhere and whose statements are so confusing and uncertain, that they would indicate the party was incompetent or demented, and are of no value in this discussion.

And if all of the foregoing evidence—that of both parties—stood alone it would be hard to determine whether or not the Argo was at said time in the middle of the river or near the eastern shore—210 or 500 feet from the bank—but fortunately for the Argo, the evidence of her crew is fully sustained by parties who were on board of the luggers, or on the towboat at the eastern bank of the river and saw the lights of both boats as the Argo came down and the Dumois came up the river, and who place the Argo in about the same position as her crew, to-wit: in the middle of the river.

JURISH, who was master of one of the luggers at the canal, which had previously broken lose and had been returned to the landing just prior to the vessels coming in sight, and whose lugger was lying on the outside of the Day Dream and from 40 to 50 feet from the bank, was asked and said, at page 91, viz.:

Q. Did you notice steamers coming down the river while you were there? A. Yes, sir; I saw the steamer coming down the river and he blew one whistle. I think

that was for the Day Dream and the Day Dream answered him with one.

Q. Where did he pass down—in what part of the river was he, could you tell? A. The boat coming down the river?

Q. Yes. A. I wouldn't swear, but I think he was coming right in the middle of the river, the same way any other steamer would come down. After a little while he blew another whistle again. He was a little more to the east, but like any other steamer, about in the middle of the river, a little more to the east, may be, a little more.

Q. Then you say he blew another whistle? A. Yes, sir. Then I looked down the river and I saw the steamer coming up the river on the east side of the Mississippi river. * * * And at page 92, he said:

Q. Was the big steamer crossing the river at the time the boats came together? A. Yes, sir, she was crossing the river.

Q. And the little boat was coming down the river about in the middle? A. Yes, sir.

Q. And the big steamer was crossing from the east to the west side? A. Yes, sir. * * *

Q. And the little steamer was coming down in the course—A. Yes, sir. And at page 93, said:

Q. The way steamers come down? A. Yes, sir.

Q. What I ask you is this—while the little steamer was coming down the river on her course, wasn't the big steamer crossing over the river in front of the little steamer? A. In front, yes, sir; sure.

The court says this witness "gives no satisfactory evidence as to where the Argo was when she first came

in sight of the Dumois," but this is clearly an error. It is true the witness speaks guardedly, for he was on the eastern bank and saw the vessels distant in front of him, and could not state the location of the Argo with exact precision, but he certainly places her far from the eastern bank, and "about in the middle of the river, a little to the east may be, a little more." But this is not all of his evidence on this subject, for he was recalled and had his attention called to a sketch made by him (copy of which is to be found on page 157) of the vessels at various times as they were seen by himself and Deedes (which he swears is correct), and their positions at such times are marked by him by the figures 1, 2, 3, 4, 5 and 6, of which he testified at pages 107 and 108, as follows :

Q. Now then coming down the river I see a mark of a boat marked No. 1. A. That is the steamship coming up on the right side of her.

Q. No. 2 what is that? A. That is the steamship when starting across the river.

Q. No. 3? A. That is were the collision took place, that is where they met one another.

Q. No. 3 are two boats? A. Yes, sir.

Q. No. 5? A. That is the Argo.

Q. That is the Argo? A. Yes, sir.

Q. No. 3; the upper one at No. 3 is the Argo also? A. Yes, sir.

Q. No. 6? A. That is the Argo when I first saw her coming down the river that is the time she blew her whistle for the Day Dream.

Q. But these are the positions of the boats in the river as you saw them? A. Yes, sir.

Q. Then you say the Argo was coming down in

what part of the river? A. She was coming like any other steamer or tug (which means in the accustomed course).

Q. What part of the river? A. In the middle of the river, but perhaps a little on the east side.

Q. Was she close to or far away from the bank on the east side? A. No, sir.

Q. She was far away? A. Far away, yes, sir.

If this is not direct and clear, and hence satisfactory, it would be hard to find evidence on any subject that is satisfactory.

DEEDES (p. 148), was pilot on the Day Dream, saw the Argo and heard her signal the Day Dream as she descended the river and passed the latter, and said latter's signal in reply, then the Argo's signal to the Dumois and the latter's cross signal in reply, which caused him to notice her and see her shooting across the river. This witness was examined as to the locality of the vessels when they came in sight of each other by reference to the above map or diagram on file marked "Libellant 3," and which was prepared under the direction of the preceding witness, and when shown this map the witness said (p. 150) it was pretty much correct, and with said map before him, at page 151, was asked and said:

Q. Here is No. 6 boat, what would you think—what would you think that to be, No. 6 boat coming down the river? Would you take that to be the Argo coming down? A. The only boat coming down was the Argo.

Q. Now, then, when you first saw her it blew one whistle? A. Yes, sir.

Q. Then afterwards the Day Dream answered that one whistle? A. Yes, sir.

Q. That would be when she would be about there and you down here? A. No, sir. Somewhere about where No. 5 is.

And this was when she whistled for the Dumois, and this places her where she is located by all the other witnesses for the libellant, in the middle of the river, and confirms the evidence of those on watch on board of the Argo.

And all the probabilities of the case point to Brown being where he says he at the time was, in the middle of the river. He was a skillful and experienced pilot of a great many years' standing—one who knew how many degrees there were in a point of the compass—his objective point was the jetties, which he was in great haste to reach, and not the east bank of the river at the New Canal, and he well understood that he was to reach that point as soon as the streamship Whitney, which had preceded her some hours. Under this condition of things, why should he be on the east bank instead of in the middle of the stream, where he would get the benefit of the current and make the best time and be facilitated in accomplishing the purpose of his trip? Not only the evidence, but all the probabilities are in favor of the Argo being where the libellants' witnesses place her; and this probability, even where there is a conflict, is not to be overcome except in case of a clear preponderance of evidence.

In the case of the City of New York 147, U. S., p. 79, the Court said: "Indeed, the probabilities that a steamer * * * will pursue the course customarily pursued in that vicinity by vessels bound from and to the home port, is so strong that deviation from that course

without apparent cause will not be considered as established without a clear preponderance of the testimony."

And that the middle of the river was the proper place under ordinary circumstances for a descending boat we will hereafter show.

We then have the evidence of Brown, Desemus, Orkney, Green, Jurish and Deedes on one side, supported by all the probabilities of the case, and further supported by the presumptions of the law, that when the vessels came in sight of each other the Argo was in the middle of the river, and demonstrated to be correct by the finding of the wreck of the Argo where she sank, 500 feet from the western shore (pp. 110 and 114), after the collision without moving to either the eastward or westward, and opposed to this is only the evidence of Lumbard, Sabitsen, Larsen and the ignorant and demented old Nicholas Theodore, who could neither read the statutes, pilot regulations, or figures and directions on the charts which should control him, and who in demonstration of his incompetency and ignorance of said statutes and regulations, and of the "starboard hand rule" or "rule of the road" which said regulations declared should be a "standing rule" for the government of pilots when vessels were meeting end on or nearly so, declared the Argo should have continued "right straight ahead" (p. 226) although he says he did not know whether she was going toward him at the bank of the river or down the river (p. 229), and that the Dumois in opposition to said "standing rule," and notwithstanding the signal for the contrary signal, which he said he heard from the Argo, should have pursued the

"port hand rule;" who testified the Argo was so close to him that he could see she was a white boat from his own chimney light, and although so near, and although he could not tell whether this white boat, which he thus saw, was going towards him or down stream, yet was "scared" she would sink his boat lashed to a tree on the bank and protected from such dire disaster by the lugger outside of him; who never heard the Dumois' whistles, never saw her until she was crossing the river with her white and green light in view, when some one called his attention to her, testified the pilot of said Dumois was "scared of the lights" (his lights) and "could not come on top of me" (him) "and sink me" (him) lashed to the bank with Captain Jurish's lugger on the outside of him, and all extending less than 50 feet from the bank; and yet the evidence of this "scared" old, ignorant, demented and pretended pilot, who did not know the width of the river on which he pretended to be a pilot, any where, not even at New Orleans, where he testifies it is a mile wide, while the fact is (as the chart, which he cannot read, and for which he says he has no use) shows is half a mile wide, the court refers to and adopts, saying at page 334:

"Nicholas Theodore, pilot on the tug Day Dream, which with its tow was about to land (had landed) at the lugger landing on the left bank just above where the collision took place, says that the Argo passed so close to him that he could see her color, that she was about 50 feet from him and he was afraid she would run into him."

And the intelligent, clear, direct evidence of Jurish, who was *not* "scared" of being sunk, although he was on his boat on the outside of the tug Day Dream, is re-

jected as unsatisfactory. Surely an attentive reading and analysis of the evidence of Theodore will show that it is worthless, biased and false, and of no value in determining anything in this case, and that the weight of evidence—that of said Brown, Desemus, Orkney, Green, Jurish and Deedes, six witnesses to three, with all the presumptions of law and fact in its favor, shows the Argo was at the time, where she claims to have been, to-wit, in the middle of the river.

Again. The river at this place is about 2,400 feet wide (see chart of Mississippi River Comm'r), and if the Argo was as close to the east bank as the Demois' witnesses put her, how does her wreck get within 500 feet of the opposite bank? There was not sufficient time from the moment the signals were crossed for her to have reached that point, unless the Argo was near the middle of the river, and in fact not sufficient time for the Dumois to have reached that point, farther to the westward than the Argo was (because the Argo struck the Dumois on her starboard side). The finding of this wreck is like the last fixed and certain point in a survey where all other points or corners are missing, but which can easily and certainly be found by running the back courses, and this, in this case would bring the Argo at the time in question where her witnesses put her, in the middle of the river.

But it is said in reply, how did the Dumois get from the eastern shore to within 500 feet of the western bank where it is claimed the collision took place? In reply we say there is no proof, nor is there any admission as to how near she was to the eastern shore. Larsen, the last man at the wheel, who took charge after the signals

were crossed and when the Dumois' wheel was hard astarboard, says she was half her length, 105 feet from the eastern bank. Lumbard says she was a ship's length, 210 feet; Sabitsen says she was 500 feet from said bank, and Theodore (*did not*, as the court finds) say the Argo was 50 feet from him or his boat, but on the contrary said "I could not tell how many feet it was away" (p. 225), and that she was more than 50 feet away (p. 229). And all that is said in the pleadings of Springer, is the indefinite assertion that the ascending steamer was "on the east bank" (p. 1), and in his answer found, on page 30, that there was fully 300 feet between the course the Dumois was then running and the luggers, all of which means the Dumois was toward the eastern bank, and, as the Argo's witnesses state, off the Argo's port bow.

But again it is said, suppose she was toward the eastern bank and not close against it, and to the eastward of the course of the Argo, being a much slower vessel, how could she get across the bow of the Argo? It is to be borne in mind that the Dumois was the ascending vessel, and when she swung her starboard side to the four mile current (see evidence of diver Conrad pp. 167 and 168) and diagonally across it, and thus received the very strong wind then blowing on her starboard beam, she had not only the force of her steam power propelling her, but the force of said strong current and wind greatly assisting her, and which would nearly double her speed, while the Argo being the descending boat running with the current would be impeded by the current in her starboard movement with a port helm, and would not be assisted by said wind, which would only strike her on her stern after her bow began to turn to the westward.

In fact we believe that when both vessels were thus crossing the river, the speed of the ascending vessel in crossing the river was far greater than that of the descending vessel, and this theory would get both vessels to the point where the collision occured (as evidenced by the finding of said wreck) within 500 feet of the western bank. If the Dumois was where she claims she was when the vessels came in sight of each other, and was only making 10 miles per hour in crossing the river, and was not greatly assisted by the strong current and wind on her starboard side while crossing diagonally across it, how did she within the time stated get to the place where she says the collision did occur, to-wit in the middle of the river? And if the vessels were "head and head" as is claimed, and the speed of the Dumois was not increased by the strong wind and current in crossing the river, and the Argo impeded by said current while crossing, the Argo being under ordinary circumstances the faster boat, and both vessels swung to the westward at the same time, how is it possible that the Dumois could have gotten farther to the westward than the Argo, where she certainly was, for the Argo struck her on her starboard bow? No other theory than the above would put the Dumois where she claims she was when the collision occurred.

Surely, the foregoing evidence, and especially the direct and positive evidence of Jurish, who has no interest whatever in the case, and who saw the Argo when she first whistled to the Day Dream and continuously thereafter until she sunk, and who says she was *far away* from said eastern shore where he was a spectator, cannot be wrong.

And that the wreck of the Argo does lie sunk (as above stated) 500 feet from the western shore, and never moved after the collision occurred, except perhaps floated down stream for four minutes until she went out of sight to the bottom, we will show under the head as to "where in the river the boats came in collision."

II.

WHAT DID THE RESPECTIVE VESSELS DO TO AVOID COMING TOGETHER?

Captain Brown's description of what he did begins at page 49, where he was asked and said as follows :

Q. A short time before you saw this boat (Dumois) did you see any other boat? A. Yes, sir, I passed the Day Dream; she was on the east shore; she was making a landing, I think—something of that kind. * * *

Q. Did you give any signal to her? A. I blew one signal to her and she answered by blowing one.

Q. When you passed her did you see any other vessel? A. Yes, sir, I saw the vessel.

And at page 49 said :

Q. What did you see, rather? A. I saw a bright and red light coming up on the east shore. * * *

Q. Over what bow of your vessel did you see? A. On the port side of our bow, forward. * * *

Q. Upon seeing it did you give any whistle? A. I blowed one whistle.

Q. Prior to your blowing one whistle had you received any whistle, had you received any whistle from the other boat? A. No, sir, not anything.

Q. After you blew one whistle, what then? A. It

was some time before she answered by blowing two blasts of her whistle—the ship coming up.

Q. What did you do then? A. I immediately afterwards, I blowed again. I repeated with one whistle again, and then put my helm hard a-port.

Q. When she blew two whistles was there any change in her course? A. Yes, sir, I could see she had starboarded her helm.

Q. What lights did you see then? A. I saw the green light coming out after she changed her course.

And at page 50 said:

Q. That indicated to you what? A. That he was going across my bow.

Q. He was going across your course? A. Yes, sir.

Q. After he blew two whistles? A. After that he never blew any more until he blew his alarm.

Q. After you blew your one whistle the second time did he reply with two whistles? A. No, sir.

Q. What did he do after you blew your one whistle the second time? A. About that time he was right on top of me—very near me; then he blew his alarm.

Q. Did they come together—did they come together shortly after that? A. About 15 seconds. * * *

Q. After the collision occurred what was done—how did they strike together, where did they strike? A. I struck the Dumois eight feet aft from her stem—eight feet.

Q. Did you examine the place afterwards? A. I saw it when she was at the dock. Then the vessel was going so fast it was half a mile before her headway was stopped, she went by me so fast. She was five or six seconds passing me. * * *

Q. By one blast of your whistle and the porting of your helm, what was the purpose of that? To which way did you want to go? A. I wanted to go to the westward, on the other side, out of his way; I was quartering. By the velocity I was going I was sure I could have passed him. We were going pretty near 20 miles an hour.

Q. Was the Argo a fast boat? A. Yes, sir, she was a very fast boat—a fast yacht. But he steered right across my bow. * * * (Page 51.)

Q. How far past you did she go before she stopped—you drifted astern? A. No, as soon as I got under her stern I told the engineer we would try and get to the west bank. We were going across; she was up the river nearly half a mile before she stopped, passed us.

DESEMUS, the lookout and deckhand, was asked and said, page 80:

Q. When you passed this, you say you passed something on the left bank—east bank? A. Yes, sir; I thought it was the Day Dream, or some of them small boats towing barges.

Q. Did you give any signal to these boats? A. Yes, sir, I gave one—at least Captain Brown gave one to them.

Q. About that time did you notice any other lights anywhere; if so, when? A. Shortly after we passed the last craft I saw a light. I was on the lookout. I saw a red and white light.

Q. You were on the lookout? A. Yes, sir.

Q. How far off from you was it when you first saw it? A. About three-quarters of a mile.

Q. Do you know whether Captain Brown saw it at

the same time that you did, or about the same time? A. I think he did, because as soon as I saw them I said, "Captain Brown, there is a vessel coming." He said, "Yes." He waited a little while. I expected to hear the vessel blow. She didn't blow, so he blew one blast of his whistle.

Q. What was the next thing that occurred? A. About 10 or 12 or 15 seconds after he blew we got an answer of two whistles. Captain Brown blew one immediately. We got no answer and Captain Brown headed her to Algier's bank, and this vessel took a change and came across the river.

Q. She left the east bank and came across the river to the west bank? A. Yes, sir, towards the west bank.

Q. When she came across did she make any change in her lights? A. Yes, sir, I saw the green light and the masthead light as well.

Q. Was the red light shut out? (p. 81) A. Yes, sir. I saw the green light all through the change when she was going across the river.

Q. As soon as the Dumois crossed the Argo's signal, and the red was shut out and the green light appeared, what did you do then. A. I left the bridge and started back aft.

Q. For what? A. To wake up the people. I thought there was going to be danger right then. I saw a ship crossing our signal and I ran aft.

Q. Did you call them? A. I didn't go all the way aft. I stopped right at the engine house door, about amidships.

Q. How long did you stop there? A. Maybe about two seconds. I just stood there and saw the ship, then

I ran aft right away. I don't think I was four seconds going from the bridge aft, and I hollered below for them to get up quick, there was danger. As soon as I hollered danger they struck. I didn't see her strike, but felt her strike, and fell towards the companionway aft the cabin and was knocked down. I got up on my feet quickly and hollered down she was sinking, to get up quickly, and then I left the deck of the cabin for the yawl boat. But the Dumois, she had gone way beyond us. * * *

Q. I want you to be sure who it was who blew the first signal; was it the Argo or the Dumois? A. The Argo.

Q. And that was responded to by a cross signal of two blasts? A. From the Dumois—yes, sir.

Q. Then Captain Brown blew one signal? A. Yes, sir, immediately after the two were blown.

Q. Then what signals did she blow? A. I never heard any more at all until just about when I got amidships—well, before I got amidships, when I was running I heard a lot of hollering and a lot of whistles from the ship—danger signals I suppose they were blowing. * * *

ORKNEY, the engineer, at page 68, said:

I heard the whistles distinctly, both our own and others, and my attention was drawn to a cross signal given by this vessel we had a collision with. I did not know what vessel it was, but previous to that I had come up from the engine room and looked out, and I saw this tow passing, what looked like a tow passing, and I heard her whistle and saw her lights, and then I went below again and heard our captain blow the whistle which I supposed was for another steamer, and then I heard two whistles blow, which I thought was unusual, and I came

up to see what it was, and I could see the white and green light of the vessel (that is, after she had changed her course), which I knew was wrong. It should have been the white and red light. Then I hollered to our firemen, "We are gone." I could see then we never could recover ourselves. It was a very short time between the time they blew the signal and I saw this light, and I kept putting my head further up through the companionway. I was not out of the engine room a second—no time, hardly—when I saw the loom of the vessel going right up against our bow; then I saw the balance of her coming up out of the darkness. Immediately after that we struck her, and the concussion threw me down the engine room ladder, which was about four or five steps. With the shock the engine stopped, so I came on deck again, and I looked around, and they commenced to get the boat out, and then I went below again and looked around and saw her head pointing towards the bank. * * * (Page 69.)

Q. How soon was it after the collision that this steamship Dumois disappeared—the boat that collided with you—did she disappear immediately? A. Yes, sir.

Q. Was she stopped? A. She could not have been stopped at the rate of speed she was going, because when we got in the boat we couldn't see her. She had gone up the river.

Q. Did she disappear as if under way? A. I should judge she was under way, the way she was coming towards us.

Q. Was she coming slowly or rapidly? A. She was coming rapidly, because it was immediately after I saw the lights that she came right on us. (Which, of

course, was after she had changed her course, as above stated.)

Q. After she struck how long was it before she disappeared? (p. 70.) A. Not half a minute before she was gone, because we just crashed into and scraped along her sides. * * *

And said at page 74:

Q. Of the two boats, which blew the first signal, the Argo or the Dumois? A. The Argo blew the first signal.

Q. That was one blast? A. Yes, sir.

Q. What response was there to that? A. He blew two.

Q. And then the next blast? A. Then Captain Brown immediately blew one.

Q. Then what was next? A. The next was the danger signal from the Dumois, but they were all so close together there was very little time between them. * * * (Page 75.)

Q. When did you go on deck again? A. Not until I heard the whistle blow again.

Q. Not until you heard the signal from the Dumois? A. Yes, sir; not until I heard the cross signal; that was what brought me on deck.

Q. Then the Argo replied by another signal? A. The first signal she blew was answered by the Dumois with two, then the Argo blew one again.

Q. That was all the Argo blew? A. Yes, sir; then the Dumois blew the toot whistle—that is, the danger whistle; she loomed right up; she was no distance at all from us.

GREEN, the cook and steward, was asked and said, at page 96:

Q. Just prior to the collision did you hear any whistles? A. Yes, sir, I did.

Q. What whistles did you hear? A. The first whistle I heard was the Argo.

Q. What did she blow? A. She blew one blast of the steam whistle, to go to starboard.

Q. Was there any response to that? A. Yes, sir.

Q. What was the response? A. Two whistles.

Q. How soon did the response come after the Argo had blown the one whistle? A. It was inside of a minute.

Q. Well, then, were there any more whistles blown? A. Yes, sir.

Q. What were they? A. The Argo blew one blast again.

Q. Was there any response to that? A. Yes, sir.

Q. What was it? A. Two, then three short whistles on top of it, or four from the other vessel.

Q. Where were you precisely when these whistles were being given by the two boats? A. I was standing in the hatchway that led down in the dining room and kitchen (p. 10). There was a pair of steps that led all the way down, and I was on the top step with my head out of the trunk looking out *when the second whistle was blown*

Q. You understood there had been a cross signal? A. Yes, sir. I knew a cross signal had been blown, and I knew there was something the matter, and I was looking out for myself.

Q. You came, then, where you could see? A. Yes, sir.

Q. Well, what was it you saw? Just tell us in your own language? A. I saw there was a steamer coming

up the river, apparently crossing the river, and I saw that our boat was bearing right on the vessel, or that the vessel was bearing right on to ours, either one or the other. I furthermore saw—it looked to me, the way it loomed up, that a collision was inevitable. * * *

Again, at page 99, he was asked and said:

Q. After the collision occurred, after the Argo had struck the Dumois, what became of the Dumois? * * * A. As far as I know—I think she stopped her engines and drifted around there in the river after she lost her headway. I couldn't say whether she backed or went ahead; I wasn't on board of her to know—she went by there like a railroad train after we struck; it was not two seconds when we saw her back—we passed right under her stern counter.

Q. She wasn't stopped? A. I don't know whether she was going ahead or backing her propeller.

Q. But she was disappearing up the river? A. Yes, sir, at a great rate of speed.

BROADHURST, the fireman, was down in the fire room, where he heard the passing signal of the Argo, and came up after the collision had occurred, and saw as follows (p. 87):

We left Algiers on the evening of the 27th, and some time between 12 and 1 o'clock I heard the captain signal to pass a boat—he blew a single blast of the whistle, and shortly after he blew that one he blew another blast, and shortly after that the shock came. That is all I know about it—that is all I can tell (p. 88).

Q. After the shock did you come up? A. Yes, sir.

Q. Then what did you see? A. The first thing I saw—I looked forward and I saw the Dumois. I didn't

know it was the Dumois then—I saw a steamer across our bow—lying right square across it.

Q. Lying still or coming up the river? A. Coming across our bow up the river.

Q. Did she disappear rapidly? A. Yes, sir. I didn't have much time to look after her. She went out of sight. * * *

Q. When you got into the boat and pushed away from the Argo did she go down very soon after? A. Yes, sir. We hadn't got more than 100 feet before she went down. * * *

Q. At that time where was the Dumois? Could you see her? A. No, sir. We could hear her engines working, but could not see her.

Q. Was she up the river? A. Up and across.

Q. How far up was she? A. I should say half a mile.

Such is the evidence of those awake on the Argo, as to what the Argo did to avoid the collision, as well as what was done by the Dumois.

On the other hand, the evidence of those on the Dumois is directly to the oppose, and to the effect that the Dumois blew the first signal (two blasts of her whistle) and that the Argo crossed it with one blast of her whistle. The evidence of these witnesses on this subject is as follows:

LUMBARD was asked and said, at page 242:

Q. State, as near as you can, what took place from the time you first discovered the lights of the Argo? A. I blew two whistles and the Argo answered with one. I then blew again to let her know I had starboarded my helm, immediately followed up with the danger signal

and immediately stopped and backed. It was not—well, I couldn't exactly say what time it was when the Argo—came around on a port wheel—ran into our bow, our starboard bow, about 15 or 20 feet aft of the stem. She was still going ahead when she ran into and struck. Then she—we were backing—she drifted a little astern of us. * * *

Q. What interval was there between your first signal of the two blasts and the repetition of those signals? A. The second time I blew the two whistles?

Q. Yes. A. None at all—very little. I blew two and then gave them the danger signal after two (p. 243).

Q. That was hardly the question I asked you? A. I didn't understand you, Mr. Grant. I blew the two whistles first.

Q. And the Argo answered? A. With one.

Q. You repeated your whistle? A. Yes, sir.

Q. What interval was there between the repetition of those two whistles? A. It could not have been two seconds.

Q. You answered the cross signal immediately? A. Yes, sir, with two and the danger signal.

SIBITZIN, second mate of the Dumois, who says he was on watch and on the bridge with the pilot, was asked and said, page 259:

Q. Which vessel blew the first signal, and what signal did she blow? A. The Dumois blew the first signal.

Q. What signal did she blow? A. She blew two whistles, starboard helm.

Q. Was there any answer? A. There was an answer of one whistle after that.

Q. What did the Dumois do then? A. She blew two again, and then the danger signal right away. * * *

Q. Can you state of your own knowledge that you did not hear a signal from the Argo before you sounded your signal? A. No, sir, no signal from the Argo before we signaled.

Q. Did the Argo answer the danger signal? A. No, sir.

Q. How long was it after the two signals were first blown by the Dumois that the Argo changed her course? A. I couldn't very well judge—not so very long between, because she was going such a horrible speed and we were going along first rate. It must have been some couple minutes, something like that.

Q. What did you see after she changed her course? A. We saw her red light. She apparently changed her course. We were going out in the river all the time and she followed us up.

And at page 270 said:

Q. You have already said you stopped and backed your ship and lost your headway; you have further said that your ship was across the current. Now, how could the Argo drift faster down stream than you would, with both being water born? A. Because our ship did not stop as soon as the engines was stopped.

Q. Then you went on past the Argo after the collision? A. We were going a little ahead, yet.

Q. How far ahead of the Argo did you go before you stopped, four or five lengths that you have spoken of? A. I mean three or four lengths; I mean she was astern of us when she disappeared, that is what I mean.

Q. Then you had gone up stream away from her? A. I suppose so; she was not stopped.

LARASEN, one of the streersmen on the Dumois, was asked and said at page 296 as follows:

Q. Where were you when the collision took place between the Dumois and the Argo? A. At the wheel.

Q. How long had you been at the wheel? A. Three or four minutes.

Q. Did you hear any signals from an approching vessel while at the wheel? A. No, sir.

Q. Did you hear any signal given by the Dumois, and if so, when was that signal given? A. I heard it after I had taken the wheel and before I took the wheel.

Q. After the signals were given by the Dumois did you hear any signals in response? A. The first time I heard one blow from the other.

Q. What was the next signal you heard, either from the Dumois or the approaching vessel? A. Likely from the approaching vessel.

Q. What was the next signal you heard? A. It was two whistles from the Dumois.

Q. How many whistles did you hear in response to the first signal of the Dumois that you have testified to? A. Only one.

Q. After you heard this single whistle, what whistle was given? A. I heard two whistles from our boat.

Q. Did you hear any response? A. No, sir.

Q. What was the next signal you heard? A. I heard six or seven short blasts from our whistle.

Q. Did you hear a whistle from any approaching vessel before the Dumois gave her signal of two blasts which you have testified to? A. No, I did not. * * *

Q. Which way were you facing at the time the first signal was given by the Dumois? A. When the first signal was given I was not at the wheel. * * *

Q. Had you taken the wheel at the time you heard the response to the Dumois' first signal? A. No, sir.

Q. When did you take the wheel? A. Between the first and second signal.

Here again the evidence of those on the Argo as to what each vessel did before the collision is fully sustained by Pilot Deedes, of the Day Dream, and Captain Jurish, of one of the luggers, both of whom were at the shore opposite and witnessed the operations of both vessels.

DEEDES, after describing how the Day Dream landed luggers, when one of them got adrift, how the Day Dream went after her and secured and landed her, at page 148 said:

We made a landing first at the canal (opposite to which the collision occurred) with these luggers, and one of the luggers got adrift, then we went after her, about 12 o'clock we went after this lugger.

Q. Did you get hold of her? A. Yes, sir.

Q. What did you do with her? A. We came up with her and made a landing just below the canal.

Q. Was there any boat in the river that gave you a signal? A. We were about making a landing when the Argo blew one whistle.

Q. Did you make any reply? A. Yes, sir, we answered.

Q. With one whistle? A. Yes, sir.

Q. After that did she blow again? A. She blew one whistle again.

Q. What was the next thing? A. I heard another boat blow two whistles; it must have been the Dumois.

Q. Did you see where the Dumois was when she blew two whistles? A. She was just behind the Day Dream.

Q. On the east shore? A. Yes, sir, coming up, hugging the shore.

Q. Well, then, when the Dumois blew two whistles did she keep her course or did she change her course? A. When she blew two whistles that drew my attention and I went over to the other side of her (the Day Dream) and looked and saw the Dumois crossing the river and saw the green shooting across.

Q. After the Dumois blew two whistles did the Argo blow another whistle? A. Yes, sir, she blew another whistle.

Q. She blew one blast? A. Yes, sir.

Q. After that what did you hear, if anything? A. The Dumois blew her danger whistle—four whistles.

Q. Did anything occur after that? A. Then the Argo answered with the same danger signals. (Of course the latter is a mistake, as the Argo did not blow any danger signal, but in all other respects this evidence confirms that of the Argo.)

Again, at page 150, this witness said:

Q. After the Argo blew her whistle as you have described, the Dumois then blew one whistle and crossed the river? A. How crossed the river?

Q. The Dumois blew two whistles? A. Yes, sir.

Q. And went across the river? A. She went shooting across the river. I could see her green light.

And again, at page 151, said:

Q. You say you saw them after they separated? A. Yes, sir.

Q. How did they go then, did the Dumois go up the river? A. The Dumois stopped.

Q. The Dumois stopped, but she stopped after the collision occurred? A. I don't know when she stopped, but anyhow they both stopped; seemed to be 200 or 300 yards apart—seemed that way. * * *

Q. Was there any distance between the Argo and the Dumois? (Page 152.) A. I told you about 200 or 300 yards.

Q. Which was the farthest up the river? A. The Dumois.

Again, on cross-examination, at page 153:

Q. How long before the Argo came down did you succeed in getting her (the lugger) into the landing? A. We had just made the landing when the Argo blew one whistle—just made the landing.

Q. You were just tying up in there? A. Yes, sir, just making the landing.

Q. The Argo first blew when she was opposite you, didn't she? A. No, she blew before she got to us; she was far above us.

Q. How far up? A. It might be 50 yards—150, in fact—above us. * * * (Page 154.)

Q. When did the Argo whistle the second time? A. A short time after they blew one whistle again.

Q. And she passed you then? A. No, she had not passed us then.

Q. She first blew for the Day Dream 150 yards above you? A. Yes, sir.

Q. And when she got opposite you she blew another whistle again? A. Yes, sir; not quite opposite us yet. * * * (Page 155.)

Q. You have been asked how the pilot house was, etc.; but when you saw the Dumois coming up the bank, on the east bank as you have described, were you in the pilot house at that time? A. No, sir, I was on the main deck.

Q. On which side of the Day Dream were you, on the starboard side or the port side? A. When I heard the two whistles I went to the port side. I could not see from the port side.

Q. You went to the port side and looked down the river? A. Yes, sir.

Q. And it was then you saw the Dumois? A. Yes, sir, I saw the green light.

Q. You say when you heard the Argo whistle and saw her coming down the river, you were in front of the pilot house? A. I was on the starboard side.

Q. And then you looked up the river? A. No, sir, I was looking on the bank when I heard the whistle blow. I looked up. I was just making a landing and my attention was drawn to the whistle.

Q. After you heard the signal from the Dumois to the time the boats came together and then separated as you have described, was there anything to interfere with your seeing them? A. No, sir.

Q. You were standing on the port side looking at them? A. Yes, sir.

And at page 156 said:

Q. When was that, when did you see the green light on the Dumois? A. After she blew the two

whistles; after the Argo blew one whistle and I heard some other boat answer with two whistles, that made me go to the other side of the boat, and then I saw the green light on the boat coming up.

JURISH, who was at the river bank at the time, was asked and said at page 91 as follows:

Q. Were you inside or outside of the Day Dream? A. I was on the outside.

Q. How close were you to the shore? A. I was from the shore—about—the Day Dream was making a landing—I was from the shore—I don't like to make a mistake—about 50 feet, I guess, from the bank. I don t think—I guess 50 or 40 feet from the bank. * * *

Q. Did you notice any steamers coming down the river while you were there? A. Yes, sir, I saw the steamer coming down the river, and he blew one whistle, I think it was for the Day Dream, and the Day Dream answered him by one whistle.

Q. Then did he pass down—in what part of the river was he, could you tell? A. The boat coming down the river.

Q. Yes? A. I wouldn't swear, but I think he was com ng right in the middle of the river, the same as any other steamer would come down. After a little while he blew another whistle again. He was a little more to the east bank, but like any other steamer about in the middle of the river; a little more to the east, maybe—a little more.

Q. Then you say he blew another whistle? A. Yes, sir; then I looked down the river and I saw the steamer coming up in the river, on the east side of the

Mississippi river. I didn't hear any answer from the steamer.

Q. From the steamer going from the east shore? A. Yes, sir; then after a little while I heard four whistles that the steamer was blowing; then she was a good distance out in the river, you know; then I saw the little boat coming down blow four whistles; then after that I saw the little boat hit the big boat on the right side on his bow. * * *

And at page 92 said:

Q. Was the big steamer crossing the river at the time the two boats came together? A. Yes, sir, she was crossing the river.

Q. And the little steamer was coming down the river about the middle? A. Yes, sir.

Again, at page 93, said:

Q. What I ask you is this: While the little steamer was coming down the river on her course, wasn't the big steamer crossing over the river in front of the little steamer? A. In front, yes, sir, sure.

And these witnesses are confirmed by said Nick Theodore as to the whistles blown by the Argo. (Rec., pp. 228-9.)

It is therefore clear from the evidence of both sides that both vessels, after the signals were crossed, proceeded from the places where they respectively were in the river when they came in sight of each other toward the western shore; and it is equally clear from the weight of evidence (and the court finds it to be a fact) that the single blast of the Argo's whistle was the first blown to make the above manœuvre, and that it was given strictly in accordance with law we will show hereafter.

III.

THE NEXT INQUIRY IS, WHERE IN THE RIVER THE STEAMERS WERE WHEN THEY CAME TOGETHER?

CAPTAIN BROWN was asked and said on this subject as follows, at page 50:

Q. In what place in the river were you when the collision? A. We were a little to the westward of the middle.

After the loss of the Argo some movables from her floated and were found on the west shore, and concerning these this witness testified as follows (p. 54):

Q. There was some wreckage came ashore? A. Yes, sir, on the west side.

Q. What did it consist of? A. Stern sheets of the yacht that were aft on the quarter deck, they floated off and went on the west shore; a little raft.

Q. Was there anything in the shape of life preservers? A. Yes, sir, there were some of them further down; we didn't see them picked up; they were picked up by some of the natives.

How for below was that, where you saw it—was it below Lucas canal? A. It was two or three miles.

Q. On the opposite side of the river? A. Yes, sir, on the west shore.

Q. Would that indicate, in your judgment, anything as to where the collision occurred with reference to the river—whether in the middle of the river or on the east or west bank? A. It was certainly on the west bank, for that drift came in on the west shore; it was evidently there.

ORKNEY, the engineer, was asked and said, at page 69:

Q. When you came up, as you have stated, and looked out and saw the Day Dream, or the Day Dream tow—A. I saw a tow. I didn't know what vessel it was.

Q. How for were you from the tow, with reference to the bank of the river—were you close to the side the Day Dream was, or on opposite side, or about the middle? A. I guess we must have been in the middle, because we were so far away. I could make out it was a tow by the lights, but I couldn't see the vessel at all.

And after this witness had described the sinking of the Argo and how her crew had taken to the yawl, was asked, at page 70, and said:

Q. What was the next thing you did? A. We hollered to the vessel (Dumois.) We heard some voices aboard the vessel, although we couldn't see the vessel. I saw we were midway between the two shores and I proposed that we pull ashore; we didn't know which shore to go to, because one was as far as the other; then they commenced to holler on the steamer; she was backing down towards us.

DESEMUS was asked and said page 82:

Q. After you got into the yawl could you see the bank of the river? A. I could see the dark shade to the west bank—to the Algiers bank.

Q. Which bank were you closest to? A. To the Algiers band, the right bank going down, or west shore.

BROADHURST, the fireman, was asked and said, page 89:

Q. While you were in the yawl boat could you see the banks of the river on each side of it? A. I could see the bank of the river before we left the Argo; as

soon as my eyes got rid of the glare of the fire room I could see the banks.

Q. In which part of the river was the Argo then? A. About the center.

GREEN, the steward, was asked and said, at page 101, as follows:

Q. Now, after you got into the yawl boat and the Argo had sunk, could you see the banks of the river then? A. Yes, sir; we were closer to the west bank than to the east bank, and we started for the west bank, it being the closest, to try to get there in the yawl boat.

LINDAUER, one of the newspaper correspondents on the Argo, and who was saved, was asked, at page 159, and said:

Q. When you first came out of the cabin could you have any idea where the Argo was in the river? A. Yes; sir; the first thing I looked for was to see how far we were from the shore, thinking I might have to swim.

Q. What did you do then? A. I saw a woody shore—trees—I couldn't tell which side it was, whether it was the east or west bank, but as near as I could judge —well, between 200 and 250 feet, I should judge, from the shore, was where the Argo was, as near as I could judge.

And at page 162 this witness said:

Q. When you were in the small boat could you see the trees on the bank? A. Yes, sir; I could see the trees.

Q. Could you notice how close you were to those trees then? A. Not even then.

Q. Well, after you got on board the Dumois did you notice how close you were to the shore? A. Yes, sir.

Q. Which shore were you nearest to? A. The woody shore on the west bank of the river.

Q. Then you were nearer to that shore than you were to the east shore? A. Yes, sir; decidedly.

JURISH, who was on the east bank and who would have the least opportunity to judge exactly where the

collision occurred, was asked at page 92, and said as follows :

Q. About what part of the river were they when they came together? A. They were about, right a little below where I was.

Q. No, no, but I mean with reference to the bank —where they in the middle of the river, or near the east bank or near the —— A. They were in the middle of the river ; a little more, maybe, to the east side.

DEEDES, who was also a witness of the collision from the east shore, was asked, at page 151, and said as follows :

Q. Well, then, the point of the collision would be right opposite where the Day Dream lay on the shore? A. Yes, sir.

Q. A little westward of the middle of the river? A. Something like that ; in the middle of the river, or a little more to that side.

Q. A little more to the west side? A. Yes, sir.

The foregoing evidence as to the place in the river where the collision occured is somewhat at variance, but all is to the effect that it occurred between the middle of the river and its western shore ; but that Captain Brown, Green, Desemus and Lindauer are correct in their statements that the point of collision was well to the west of the middle of the river is settled beyond all dispute by the finding of the wreck of the Argo, by NORBERT BURAS, who, after stating how he found the same, describes its location, at page 110 of his evidence, where he was asked and stated as follows :

Q. How far below the canal is the place where this wreck lays? A. It is about four arpents, more or less

Q. Four arpents, more or less, below the canal? A. Yes, sir.

Q. Near which bank of the river? It is nearer the right bank going down, or the left bank? A. It is on the right bank going down.

Q. How far from the bank of the river is the wreck? A. About 500 feet, more or less, from the right bank.

Claimant, realizing the force of the above argued in the Court of Appeals, that the presence of said wreck 500 feet from the western shore was accounted for by the evidence of Orkney, the Argo's engineer (which it was contended, was to the effect that *immediately* after the collision the Argo's engines, which had been stopped by the collision, as well as her headway) were started, when she was heading toward that bank, and that this would carry her from the contended point of collision in the middle of the river where she sank, but there is no evidence to support this contention.

Orkney's evidence shows, that after the collision had taken place, after the Dumois had passed along the front of the bow of the Argo (which was knocked in, p. 242) and gone out of sight, and after the yawl of the Argo had been lowered into the water and while the crew were getting into it preparing to leave the Argo to save their lives, and when she was sinking rapidly, that it was noticed that her head was pointing to the west shore, when Captain Brown thought she might possibly be beached, that then Orkney rushed below just prior to the yawls shoving off, and started her engines, and then she was sinking so rapidly by her head that her crank shaft was turning in the water then in her hull, and when her stern was already lifted out of water, and her propeller was revolving in the air and as a consequence not moving the Argo at all. The accuracy of this statement, and the error on any contention to the contrary can best be demonstrated by giving the evidence of Orkney, as taken from his own lips by the stenographer as it appears on pages 75 to 77, as follows:

Q. The Argo struck the Dumois at right angles?
A. It looked like it.

Q. Did the shock stop the engines of the Argo?
A. Yes, sir.

Q. Did you go back and start the engines again?
A. Yes, sir, the second time.

Q. How long did her engines work after you struck?
A. The engines were working after we left the boat, her stern was out of water and her wheel was revolving.

Q. When did her stern come out first? A. When we were lowering the boat.

Q. How far were you from the Dumois? A. I couldn't see her then, she had gone.

Q. The Argo continued right down stream? A. We couldn't tell where she was going, she was pointed towards the bank when I went down to start her up the second time.

Q. She didn't stop from the time until you got oft of her? A. No, sir, she was still going (not ahead as was contended, but) like a hog rooting (which is anything but going ahead).

Q. Can you tell how long it was from the time of the collision to the time you cast off the line of this boat with the men in it? A. I should judge it was about three minutes.

* * * * * * * * * * * *

Q. Mr. Orkney, have you already stated in this case that you started the engines of the Argo before you left her? A. Yes, sir.

Q. Please state when it was—at what time that you started the engines, and if you know, in which way the Argo was heading at the time you started them? A. It was shortly before I got into the boat.

Q. Had the boat already been launched? A. The boat was in the water, they were holding on to the painter, some were getting into the boat at the time I ran down and started her up.

Q. Then they were in the boat? A. Some were in the boat and some were on deck.

Q. They were on deck ready to get in? A. Yes, sir.

Q. And then it was that you started the engines? A. Yes, sir, after I passed the painter to the captain, the captain was in the boat and I passed the painter to him and went below and started the engines up.

Q. How did you happen to go and start them up? A. I saw her heading toward the shore and I thought, with the suggestion that the captain made, that we might

beach her and save her, but we didn't know at that time that she was so badly damaged.

Q. How long was it prior to your shoving off from the boat? A. We were in the boat three minutes from the time we hit, it must have been two minutes after we struck that I started her up again.

Q. It was just prior to your shoving off from her? A. Yes, sir, I went down and started her up, and when I started her I found that the crank was turning in the water and I saw then that the boat was going down very rapidly and we had just time to get away from her.

And this is fully supported by Lindauer at page 161 :

Q. How long did the Argo float after you got into the yawl boat? A. After I got into the yawl boat I don't think it could have floated over a minute or a minute and a half.

Q. You had only got away when she went down? A. Yes, sir, just barely got away from her. The way I noticed that the wheel of the Argo was turning, was that someone called out, look, you will go under her counter, and they took an oar and shoved the stern of the yawl boat from the stern of the Argo, just then the stern of the Argo lifted in the air.

* * * * * * * * * *

Q. At the time that you shoved off from the Argo, was the Argo making headway through the water at all or just floating? A. That even I don't know, I know her wheel was in motion.

Q. The wheel was under the water? A. When I first noticed her wheel, but after we got a distance away from her, say probably 15 or 20 feet I could see the wheel in the air and the revolution was so much faster than it had been under water I thought she was fighting the air.

And the evidence of the claimants themselves shows that after the collision the Argo never moved from the place where the collision occurred, except floating down stream. So say both Pilot Lumbard and Mate Sabitsin. At page 245 LUMBARD was asked by claimants' proctor and stated as follows :

Q. Which way did the Argo go after she struck the Dumois? A. She drifted very slowly along our side. About the time she got under our stern our headway was fully stopped and she was right there within a—well, a ship's length, I suppose, under our stern.

Q. Did she have any headway on, did you notice? A. When she sunk?

Q. Yes. A. No, sir.

Q. Do you know which way she was pointed? A. She was pointing a little to the west shore.

Q. Up stream? A. Yes, sir, up stream.

And SABITSIN, the mate, at pages 270 and 271, said:

Q. She went down just about where the collision occured in the river, only a little further down stream? A. She drifted below that.

Q. But she didn't go either to the east or the west bank? A. I couldn't tell.

Q. You saw her lights? A. Yes, sir, I saw her green lights.

Q. Did that green light that you saw, did it go after the collision, did it pass to the eastward or the westward, or remain in about the same place? A. As I saw it, it remained in about the same place.

It is therefore, clear from the evidence of both sides —in fact it is one of the things settled in this case (and settled notwithstanding the evidence of the master of the Dnmois in direct opposition to that of his mate and pilot, who on coming on deck as the collision occurred, said p. 211, "then I saw the yacht, she drove alongside of us and then went full speed to the west bank") that the Argo sank at a point in the river neither to the eastward or westward of where the collision occurred.

And this most important fact the court fails to notice or in any manner heed, as well as it does the further fact, that after the signals were crossed and when the danger was imminent the man steering the Dumois was suddenly taken from the wheel and the man Larsen, who did not know the meaning of a crossed signal, was put in his place.

And that the wreck as found by Buras is the wreck of the Argo is established by Captain Brown's identification of the parts of the same which Buras brought up with his grappling iron, and which are in evidence. See Brown's evidence taken May 24, 1897 (p. 114); also that of Springer, taken in open court on December 16, 1897 (p. 180).

This location of the wreck is not only confirmatory of the place where the collision took place, but it is also strongly confirmatory of the fact that the Argo was in the middle of the river when she first saw and first whistled to the Dumois with one blast of her whistle, for there was not sufficient time after her first signal was crossed and the Argo's second signal blown and her helm ported, for her to have gone far before the vessels struck, whereby the Argo's forward motion was entirely stopped, and from that time to the sinking she obtained no headway to the western bank.

Having established, as we believe, that when the vessels first came in sight of each other, the Argo was in the center of the stream descending, and that the Dumois was on the eastern shore about 400 or 500 feet from the bank (and the mate on watch says she was 500 feet), coming up the river and a mile or more distant from each other; and having further established, as we believe, that the Argo, after having first blown one blast of her whistle as a passing signal to the tug Day Dream landed at the eastern shore, and received an answer of one signal from said Day Dream, that immediately thereafter she blew a passing signal of one blast of her whistle to the steamship Dumois, and that she received from said Dumois a cross signal of two blasts of said Dumois' whistle and that thereupon said Argo replied with another single blast of her whistle and at once ported her helm to go to her starboard, while said Dumois, immediately after crossing the signal of said Argo, changed her course and shot across the river in front of the Argo and thereby caused the collision, we will undertake to show which vessel was in fault in causing said collision.

And as preliminary to this question we will show that the course pursued by the Argo in the middle of the river was under ordinary circumstances the proper course for a descending boat. So says Lumbard, the pilot of the Dumois, at page 244, where he was asked and said as follows:

Q. Which side of the river is it customary for the descending boat to take? A. They take the middle of the river.

Q. Why is that? A. Because there is more current there.

And at page 48 Captain Brown, of the Argo, was asked and said:

Q. Whereabouts were you in the river when you first noticed the steamer which came in collision with you —where was your boat, in what part of the river? A. I was in the middle of the river.

Q. You were going down stream? A. Yes, sir.

This he repeats at page 50, and on page 57 he says he was on his right course (the middle of the river), referring to the middle of the river.

And Captain Jurish, at page 91, says the boat coming down the river "was coming right in the middle of the river, the way other steamers would come down. He was a little more to the east, but like any other steamer about in the middle of the river; a little more to the east, maybe—a little more."

And there was no place for an ascending steamer to cross where this collision occurred, and especially not when the wind blows as it did that night. (Lumbard, p. 244.)

And there is no evidence to the contrary, and we therefore say that according to custom the Argo was in her proper place. The only suggestion to the contrary is to be found in the latter part of the third article of the Dumois answer to the libel, but in the amended petition praying the benefit of the limited liability acts of Congress filed by the claimant of the Dumois the middle of the stream is declared to be the proper place for a descending steamer, but we apprehend that notwithstanding the

above evidence, and the last judicial averment by the claimant on this subject he will again contend her proper place was on the west shore of the river. This contention is evidently based on the 25th article of act of August 19, 1890, to adopt regulations for preventing collisions at sea, as amended by the acts of May 28, 1894, and August 13, 1894, and June 19, 1896, and proclaimed by the President of the United States to take effect July, 1897, but this act has no application whatever, for the date of its taking effect was July 1, 1897, while the collision took place before that day, to-wit: on January 28, 1897.

Nor does the act of March 3, 1885, or any of its provisions destroy or interfere with the usual custom of the descending vessel taking her course in the middle of the river, or attempt to fix the proper position of the descending vessel, for it has no application to the facts of this case. Its last clause exempts its operation from the navigation "within the harbors, lakes and inland waters of the United States.

It is true it is contended there were no such laws relating "to the harbors, lakes and inland waters of the United States," but unfortunately, for that contention and the decision in the 44 U. S. Ap., 353, directly the opposite has been decided by the Supreme Court of the United States in the case of the Delaware, 161 U. S., p. 459, decided March 2, 1896. At page 463 the court says:

"The International Code for preventing collisions was first adopted by act of April 29, 1864, incorporated into the Revised Statutes as section 4233, and was made applicable generally to the 'vessels of the navy and of the merchant marine of the United States.' This code remained substantially unaffected by congressional legislation until March 3, 1885, when the Revised International Regulations for preventing collisions at see were adopted by act of Congress, and made applicable to 'the navigation of all public and private vessels of the United States upon the high seas and in all coast waters of the United States.' By section 2, all laws inconsistent with

these rules were repealed, except as to the navigation of such vessels within the harbors, lakes and inland waters, the original code of 1864 still remains in force, explained and supplemented by the rules of the Supervising Inspectors. The Act of 1885 did not attempt to draw the line between the high seas and the coast waters of the United States, on one hand, and the harbors and inland waters, on the other. Nor was it possible by any general rule of legislation to do so. We are of opinion, however, that the dredged entrance to a harbor is as much the inland waters of the United States within the meaning of this act as the harbor within the entrance, and that the real point aimed at by Congress was to allow the original code to remain in force so far as it applied to pilotage waters, or waters within which it is necessary for safe navigation to have a local pilot."

Again, at page 464, the court said:

"The recent legislation has not only established the proper practice for the future, but has explained what must have been the intention of Congress in passing the original act. By act of February 19, 1895, c. 102, 28 Stat., 672, to adopt special rules for navigation of harbors, rivers and inland waters of the United States, these waters are declared to be still subject to the provisions of Rev. Stat., Sec. 4233 (the original code) and to the regulation of the Supervising Inspectors."

This act will be more fully noticed hereafter, but the above is sufficient to show that the article in neither the act of 1885, or in that of 1890, with its supplements, has any application to this case as to the path of the descending vessel, but that the custom of the descending vessel pursuing the middle of the river is in full force in this case.

In further pursuing this question of fault, it will be necessary to determine, first, what lights each vessel should have carried; second, what are steering rules that should govern vessels in passing each other on the Mississippi river in the night time at the point in the river where this collision occurred; and, third, what signals said vessels should have given each other.

AS TO THE RULES OF NAVIGATION.

And here it is proper to note that the rules prescribed by the Board of Supervising Inspectors of Steam Vessels, to be found at page 82 of said rules (pamphlet of January, 1896), have no application to the facts of the collision in this case, which occurred 80 miles below the lower limits of the City of New Orleans, for it is perfectly clear from a mere inspection of Rule XIV of said rules, that said rules have no application whatever in the present case. Said rule declares:

"The line dividing jurisdiction between pilot rules on western rivers and harbors, rivers and inland waters at New Orleans shall be the lower limits of the city."

Nor do the Pilot Rules prescribed by said Board of the Atlantic and Pacific Coast Inland Waters control, for the preamble to said rules expressly declares the rivers flowing into the Gulf of Mexico are exempted from the operation thereof. See page 73, of said rules. And the last clause of Rule IX of the rules last named, still further emphasises the fact that the "Pilot Rules for Western Rivers" does not apply, for, it declares:

"The line dividing jurisdiction between pilot rules on western rivers and harbors, rivers and inland waters at New Orleans, shall be the lower limits of the city."

But it does not follow that the part of the Mississippi river from the lower limits of the City of New Orleans to the Gulf of Mexico, is exempt from the operation of any rules whatever, for this case had been provided for by Congress, by act approved February 19, 1895, the first section of which declares, in substance, that on and after March 1, 1895, the provisions of Sections 4233, 4412 and 4413, of the U. S. Revised Statutes and regulations pursuant thereto should be "followed on the harbors, rivers and inland waters of the United States," and the provisions of said sections, and regulations pursuant thereto, were thereby declared special rules duly made by local authority relative to the navigation of harbors, rivers and inland waters as provided for in

Article 30 of the Act of August 19, 1890, entitled, "An act to adopt regulations for preventing collisions at sea."

Under the second section of this act of February 19, 1895, the Secretary of the Treasury was directed to designate and define the lines dividing the high seas from rivers, harbors and inland waters:

"New Orleans harbor and the delta of the Mississippi river, South Pass East Jetty light N. ½ East to Pass a Loutee light, thence N. to Errol Island and from South Pass East Jetty light W. ⅞ S. to the Southwest light, thence N. to shore."

All above this line is "rivers, harbors and inland waters" up to the lower limits of the City of New Orleans.

And said Section 4233, which prescribes the rules which are to govern on said harbors, rivers and inland waters, is as follows:

"Sec. 4233. The following rules for preventing collisions on waters, shall be followed in navigating of vessels of the navy and in the merchant marine of the United States."

And herein, first as to

LIGHTS.

Rule 3. All ocean-going steamers, shall, when under way, carry:

(A.) At foremast head, a bright white light, visible on a dark clear night 5 miles, etc.

(B.) On the starboard side, a green light, visible on dark clear nights at least 2 miles, etc.

(C.) On the port side, a red right, visible on a clear night at least 2 miles, etc.

The green and red lights are to be fitted with inboard screens, projecting three feet forward from the lights so as to prevent them from being seen across the bow.

Rule 5. All steam vessels, other than ocean-going steamers, and steamers carrying sail, shall, when under way, carry the starboard and port side lights of the same

character and construction, and in the same place as are prescribed for side lights by Rule 3, except in case of Rule 6.

Said Rule 6 relates to river steamers (steamboats) navigating waters flowing into the Gulf of Mexico, etc., and provide for signal lights to be carried on the outside of each of the vessel's smokestaks, and by the following rule:

"Rule 7. All coasting steam vessels, other than ferryboats and vessels otherwise expressly provided for, navigating the bays, lakes, rivers or other inland waters of the United States, except those mentioned in Rule 6, shall carry the red and green lights as prescribed for ocean-going steamers; and, in addition thereto, a central range of two white lights, the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The head light shall be so constructed as to show a good light through twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the vessel; and the after light so as to show all around the horizon."

Such are the provisions of law as to the lights which a vessel of the kind of the Argo should carry, but it is the colored lights alone that are to control the pilots, and hence the importance of their construction and location, which is laid down at page 81, of said regulations, as follows:

"The manner of fixing the colored lights should be particularly attended to. They will require to be fitted each with a screen of wood or canvas, on the inboard side, and close to the light, in order to prevent both being seen at the same moment from any direction but that of right ahead (not 4 points, page 251, or 4 inches, on the surface of the compass, without telling how big the compas is, as Pilot Lumbard of the Dumois, page 252, would have us believe) to two points abaft the beam.

"This is important, for without the screens any plan of bow lights would be ineffectual as a means of indicating the direction of steering. This would be readily understood by reference to the preceding illustrations,

where it will appear evident in any situation in which two wessels may approach each other in the dark, the colored lights will instantly indicate to both the relative course of each; that is, each will know whether the other is approaching directly or crossing the bows either to the starboard or port.

"This intimation, with the signals by whistle, as provided, is all that is required to enable vessels to pass each other in the darkest night with almost equal safety as in broad day."

And herein as to the rules for:

STEERING AND SAILING SAID VESSELS,

which is Rule 18, and is as follows:

"Rule 18. If two vessels under steam are meeting end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

And herein as to the directions that are to control pilots as to the

SIGNALS OR WHISTLES TO BE GIVEN.

Among the "regulations pursuant" to the foregoing sections—and especially Section 4413 – of the Revised Statutes of the United States are those to be found on pages 78, 79, 80 and 81 of said regulations of "Supervising Inspectors of Steam Vessels" where various diagrams and illustrations with directions as to what shall be done in each case, including the whistles that are to be blown.

The first situation with diagram, is when the colored lights are visible to each, which indicates the approach head and head (and by note to be found at page 73, it is stated that "in the night steamers will be considered as meeting 'head and head' so long as both the colored lights are in view of the other").

"In this situation it is a standing rule that both shall put their helms to port and pass to the right, each having previously given one blast of the steam whistle."

This is the situation of the vessels in this case as detailed by the Dumois.

The second situation, with a diagram, is where the green light is visible on each steamer (which, according to the evidence of both sides, is not the present suit, at least not until after the signal had been given. They—the vessels—are, therefore, passing to starboard, which is rulable in this situation, each pilot having previously signified his intention by two blasts of the steam whistle.

The third situation, with diagram, is where the red light only will be visible (which is the situation described by libellant's witnesses) to the pilot of each steamer. Both vessels are evidently passing to port, which is rulable in this situation, each pilot having previously signified his intention by one blast of the steam whistle.

The fourth situation, with diagram, is where the steamers are approaching each other on oblique courses and the green light of the descending steamer would be visible to the ascending steamer, and the red light of the ascending steamer would be visible to the descending steamer. This is not the present case.

The fifth situation, with diagram, is where the green of the ascending boat is visible to the descending boat, and where the red light of the descending boat is visible to the ascending boat.

This is the situation in this case, *after* the Dumois swung out and attempted to pass in front of the Argo. This situation the regulation (pages 79 and 80) says requires great caution, and that the ascending boat should put her helm to port and pass astern of the descending boat, while the descending boat should continue her course, or port her helm if necessary to avoid collision.

It will be observed that in the first situation (the one claimed by the Dumois) and in the fourth and fifth, the language of the rules that are to govern the action of the pilot, is different from the other situations, and in this. In the first situation the rule is said to be a "standing" one—that is invariable, not to be departed from—and in the fourth and fifth situations the rule is that the vessel that has the other on her starboard bow "should put his

helm to port and pass astern" of the other, while the one that has the other on her port bow "should continue on her course or port his helm if necessary. In the other situations the action of the pilot there described is merely said to be "rulable," that is, permitted by the rule. In the one case the direction is peremptory, while in the other it is discretionary.

The substance of the rules is well summed up in the following ditty, which is well known to every experienced seaman:

"When both side lights you see ahead
Port your helm and show your red,
Green to green, and red to red,
Perfect safety, go ahead."

APPLICATION OF THE ABOVE RULES TO THE FACTS OF THIS CASE.

In the first place it is proper to observe that neither party was in fault as far as their lights were concerned. It is true that in the answer of the Dumois, as well as in the petition claiming the benefit of the Limited Liability Act, it is stated the head light of the Argo (called the masthead light) was too low, and only a few feet above the plane of the red and green lights, and hence was confusing, but there is no complaint that the lights were not burning brightly, that they were not seen at a long distance off, or that any one was mislead thereby, and even if there was, said lights were located strictly according to law. Captain Brown and his lookout saw the lights on the Dumois about three-fourths of a mile or more distant, while the mate of the Dumois, who was on the bridge with the pilot, as also the man at the wheel, saw the lights of the Argo half a mile or more distant. And certain it is that the Argo had such lights as the rules prescribe even though the court intimates the contrary (p. 337). Her inspection papers so declare. The only complaint is, that the masthead light (as it is called by the Dumois) was but a short distance above the signal lights, but under the rules, she was not required to carry

any masthead light at all. The confusion in the mind of the claimant of the Dumois (if there is any) is based upon a misunderstanding of the Argo and the rule governing her lights and the place where they should be carried. The Argo was not an ocean-going steamer, or a steamer carrying sail—such as is provided for in said Rule 2 of Section 4233 of the U. S. Rev. Stat., and was therefore not required to carry a masthead light, but was a steam vessel other than ocean-going and did not carry sail, but was provided for in Rule 5, and was required to carry the red and green side lights of Rule 2, and being licensed for the coasting trade, and permitted by her inspection papers to navigate "Lakes, bays, sounds and rivers," she came under Rule 7, and was required to carry the red and green lights prescribed for ocean-going steamers, and in addition thereto a central range of two lights; the after light being carried at an elevation of at least 15 feet above the light at the head of the vessel (not the masthead light), the head light to be so constructed as to show a good light through 20 points of the compass, from right ahead to two points abaft the beam on either side (the picture of the Argo shows this light with its screen), and the after light to show all around the horizon. The side lights and the after light are not complained of, but only the improperly called masthead light, which was on the forward part of the pilot house and was proper, and not in violation of any rule.

But the highness or the lowness of the head, or white light, on the Argo can in no sense be an excuse for the pilot of the Dumois in not seeing the Argo before he even did, nor for his conduct in crossing the river in front of the Argo, for it is the red and green lights alone that are to control vessels in passing each other, as the regulations hereinbefore given declare, and concerning which the Supreme Court of the United States, in BELDEN CHASE, 150 U. S., at page 693, said:

"The importance attributed to the red and green lights is apparent through these rules (of navigation), and in the rules and regulations of the board of supervising inspectors. After diagrams are given in illustra-

tion of the working of the system of such lights, it is here said that by reference to them it will appear evident that in any situation in which two vessels may approach each other in the dark, the colored lights will instantly indicate to both the relative course of each; that is, each will know whether the other is approaching directly or crossing the bows either to starbord or port.' This intimation, with the signals of the whistle, as provided, is all that is required to enable vessels to pass each other in the darkest night with almost equal safety as in broad day."

Even the absence of any light, if it does not cause or contribute to the collision, does not render such vessel liable for the collision, 3 Fed. Rep., 870; 9 Fed. Rep., 666, and the same is true of the absence of a lookout, 16 Wall., 334; 23 Wall, 69; 96 U. S., 600; 17 Wall., 243; 2 Wod.. 258.

And the same law applies to the statement of the court made after it had alread decided the case, "that it was hardly necessary to add that, at the time she was short of her regulation crew", for the evidence shows the only men short, were two deck hands, whose places were filled by Hester and Blesine, (both competent, pp. 169 and 170), and if said "deckhands" had been on board they would, at the time, have been below and asleep, pp. 65 and 66. There was nothing unusual, and certainly nothing wrong in having the representatives of the charterer become part of the crew, and there can, in this case, be no complaint of the fact, because it did not contribute to the collision, for the Dumois lights were seen by the lookout and master of the Argo (who under Sec. 4443 of the Rev. Stat. was also her pilot) three quarters of a mile distant.

The red and green lights of the Argo having been seen at least half a mile or more distar t, what under the circumstances was the duty of the Dumois?

We think we have demonstrated that the Argo was in mid-stream and the Dumois toward the east shore of the river. In that event, it is plain under the rules that it was the duty of each vessel to sound one blast of their

whistle and pass to the right of each other, and hence the Dumois in attempting to pass on the opposite side was in grave fault and solely responsible for the collision.

But suppose that we have not shown when the boats first saw each other they were as above stated, and say that the evidence of the master at the wheel and his lookout on watch, that of his engineer and steward, and the evidence of Jurish and Deedes who witnessed the collision from the river bank, the finding of the wreck of the Argo, which never changed her position from east to west from the time the vessels struck until she sank to the bottom 500 feet from the west shore where it now lies, say all these facts are to count for nothing, the question then arises where were they? The mate of the Dumois says she was 500 feet from the eastern bank, while the evidence of those connected with the luggers shows they (the luggers) did not extend more than 40 or 50 feet from the eastern shore, to which they were tied, and this would leave 450 feet clear between the Dumois and the luggers, or more than twice the length of the Dumois, and more than ten times her width of beam. Now, the mate and pilot of the Dumois testify they saw both signal lights of the Argo (which the regulations say is "head and head"), and that she was dead ahead, or about dead ahead, and half a mile distant. What under the circumstances was it her duty to do?

Rule 18, above given, answers this in the following language:

"Rule 18. If two vessels under steam are meeting end on, or nearly end on, so as to involve the risk of collision, the helms of both shall be put to port" (the very thing which the pilot of the Argo did, while the pilot of the Dumois did the very opposite) "so that each may pass on the port side of the other."

And the diagram and illustration given by said Board of Inspectors of Steam Vessels will demonstrate what the result would have been had this rule not been violated by the Dumois. Who then was in fault, according to the location and position of the vessels as given by the Dumois? Captain Brown says he blew the signal

required under this rule, and so say his lookout, engineer and steward, and so say all the witnesses who were spectators of the collision on the shore—Deedes, Jurish, and even this old man Theodore. And this the court finds to have been the fact. The Argo, in all respects, observed this "standing rule," blew the whistle required thereby, and ported her helm as required, and was therefore not in fault.

It is true the pilot of the Dumois says there was but a ship's length between her and the eastern shore, and not sufficient room for him to pass the Argo on his left, but if that were true it would not justify his action in thrusting his ship across the course and bow of the Argo. But is it true? His mate, who knew the length of the ship better than the pilot, says there was 500 feet between her and the bank, and this evidence (and by an officer of the ship) we prefer to that of a man who pretends to be a skillful pilot, and who only knows a point on a compass, as an inch on its circumference, and cannot tell how many degrees there are in a point, and who says that vessels meeting each other would have to change their courses 4 points (45 degrees) in order that one of the signal lights might disappear.

It is also true that the witnesses from the Dumois swear they did not hear the Argo whistle before the Dumois blew her whistle, but if they did not, it was because they did not attend to their business, for not only was the signal given by the Argo, but immediately preceding it there was a like signal blown by the Argo to the tug Day Dream, and properly answered, and at a time when the latter was nearer the Dumois than when the Argo blew, and yet none of these whistles (which were certainly sounded, were heard on the Dumois, and if not why not? Simply, because the parties on the Dumois who should have heard them—the pilot and mate—on this cold and freezing night were under cover where they could not be heard. The parties who probably did hear them (the first man at the wheel—and strange to say there was a change of the man at the wheel after the collision became imminent—and the

lookout and an another sailor man on the bow of the Dumois at the time) have not been produced or examined by the Dumois. They were present and eye-witnesses to the whole affair, and, in fact, participants therein. Why have they not been produced and examined?

Nor can the Argo be found in fault for being, as the mate of the Dumois claims (and which we deny), 500 feet from the eastern bank, and especially with the wind blowing strongly from that bank, where she would find the most quiet water. The only law that controled her was said Rule 18 of Rev. Stat. of the U. S. (and not the Pilot Rules of the Western Waters), under which either wessel had the right to whistle first, whereby the one so doing became the preferred vessel, when, as said rule of the statute declares, "the helms of both shall be put to port so that each may pass on the port side of the other." If the Dumois, 500 feet from the eastern bank, had not seen the signal lights of the Argo as soon as she did and recognized her as an approaching steamer half mile distant, with plenty of time to port her helm and space within which to make the manœuvre, had kept her course—when no collision would have happened—the custom, under ordinary circumstances requiring the descending boat in the middle of the river might count for something in this case, but the Dumois not being deceived, and the Argo being seen in ample time for both vessels to make the manœuvre required by the statute the one vessel that thus glaringly and openly violates the law is solely in fault, no matter what the custom is. The law controls in this case and not the custom. In other words, the Argo's not being (if such is the fact) in the place in the river where the custom required, where she under ordinary circumstances should be, but being seen by the Dumois dead ahead, and in ample time, and the Argo having (as the evidence shows and as the court finds) given the first and proper signal and helm, the Dumois after seeing said Argo and giving an improper signal and helm, whereby the collision was occasioned, the Dumois alone is responsible, for the primary cause

of the collision was not the fact that the Argo was 500 feet from the eastern shore when recognized as a descending steamer, but the Dumois' open violation of a positive act of Congress, forbidding her to do the very thing she did do, and for which not even any custom would excuse her.

Nor can it be said the Argo was in fault because of the speed she was going. The river was about half a mile wide, the night was clear, there was no crowd of vessels, and the errand on which she was proceeding was quasi public in its nature, to-wit: to carry newspaper reporters to meet a Congressional Committee to the jetties, who had already preceded the Argo on the steamship Whitney, and whom it was necessary to overtake to secure their proceedings and report the same for the public press.

But apart from the nature of her errand and the necessity for the speed with which she was proceeding there was no restraint by law or otherwise upon her rate of speed, because, as before stated, the night was clear, there was no crowd of wessels, and the water space was ample.

The only circumstances under which a steam vessel is required to slacken her speed, or stop, or back, is when she is approaching another vessel and there is risk of a collision, or where there is a fog. This is stated by the Rule 21 as follows :

"Rule 21. Every vessel approaching another vessel, so as to involve the risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at moderate speed."

But apart from its provision in reference to fog, this rule contemplates the case of a steam vessel approaching another vessel on their regular courses and not the case of one vessel suddenly throwing herself across the pathway or course of another vessel. In other words it is a direction to a vessel approaching another vessel where the courses are converging, and does not contemplate vessels approaching each other on parallel courses, for here there is no "risk of collision" involved. This is

shown by the fourth and fifth illustrations and diagrams on pages 79 and 80 of said regulations.

The fallacy of the contrary will appear by taking the case of two carriages approaching each other from opposite directien on the same highway. Each is in its proper place for passing and each is going rapidly, when suddenly the one shoots across the road right in front of the other approaching from the opposite direction and a collision occurs. Surely no sane person would contend that the latter was in fault for not slackening its speed or stopping, or backing, before the collision occurred, and especially when there was nothing to indicate that such an insane move would be made before it actually was made. The rule will be best illustrated by reference to carriages approaching on converging highways, when it will be the duty to slacken, and perhaps to stop and back, because here there is risk of collision.

This matter has been frequently passed upon in this country and in England, and many of the cases are collected by Circuit Judge Emmons in the case of The Free State, 1 Brown's Admiralty Rep., 251, and among those given are the following:

"The Rob Roy ran down the Unicorn, going at full "speed until she was in such close proximity that the "attempt to stop was useless. The green light of the "Unicorn being extinguished, and the red light hid on account of her course, she was mistaken for a small craft. The Rob Roy ported, as she should have done had the "vessel been what the light indicated. Dr. Lushington "excused the Rob Roy for not slowing speed, becanse he "says the lights which the Unicorn displayed indicated it "was safe to do so."

In this case it is further shown that all of the rules above referred to are but declaratory of what the law was before said rules were adopted, and at page 262 said:

"The law, before the statute, was that declared by it; and therefore the rule as to slowing would be the same under the one as the other. Ought she to have slackened her speed sooner than she did? Whether the light she saw was on a steamer or on a sailing vessel,

no duty to slacken speed or to change the course of the Scotia arose until there was reason to apprehend a collision. The suggestion that it was her immediate duty to slacken speed when she saw the light, assumes what at first instance is not to be assumed. If she saw the light and observed it diligently, without having reasonable ground for apprehending a collision, no duty to slacken speed, or even change her course, was created."

And the judge further observes:

"It was not intended to change the rule of the road so far as any duty in this case was concerned, by the adoption of these articles. The regulations they establish are as old as steam and modern improvements in navigation."

And still further said:

"That the so-called 'Golden Rule' of porting and passing to the right was established before the Act of 1864; see St. John v. Paine, 10 How., 583; the Nimrod, 15 Jurist, 1201; Story on Bailm, 611; The Duke of Sussex, 1 Wm. Rob., 274; The Rose lays down the rule stringently, 1 Pars. Adm., 569, and note 4; and fully affirming the rule, see New York Co. v. Navigation Co., 22, How., 461, citing some of the leading English and American judgments. The Supreme Court says the rule is well established."

And at page 264, at the bottom, the court further said:

"A very large majority of all the decisions in reference to collisions, both English and American, assumed as well settled this principle, that actual perceived danger alone demands the duty of slacking speed."

This case of The Free State went to the United States Supreme Court, where the decision of the Circuit Court was affirmed and the above doctrine reiterated in the 91 U. S. R.. p. 200, where that court said at p. 206:

"If two steamers are meeting each other end on or nearly so where there is plenty of sea room, and at considerable distance from each other, it is not the duty of either to stop, reverse, or to slacken. The duty of each is to pass on the port side, and the rate of speed is not an

element in the case. The risk of collision is not present under such circumstances."

Rule 18, as to steam vessels meeting end on or nearly so, so as to involve risk of collision, is the same as Rule 16, as to sailing vessels meeting end on or nearly so, and the decisions in this country and in England are numerous, that when the vessel not observing this rule is condemned without regard to the one porting, not having stopped before the collision occurred. Two English cases are given by the court in The Free State, 1 Brown's Admiralty, page 265, as follows:

"The Cognac (Holt's Rule of the Road, 133). Two vessels approached end on. The one followed the rule and ported, but the other suddenly starboarded, and brought about the collision. Dr. Lushington pronounced against the offending ship, although the other was proceeding under full steam; no criticism whatever was made upon the rate of speed.

"The Concordia (Holt, 142). So far as this question is concerned, the facts are substantially the same as those in the Cognac. For a faulty starboard movement, the Concordia was condemned for the whole damage, although the other vessel was proceeding with rapidity up to the moment of the collision."

On this subject of a faulty starboarding of the helm, see also The Maggie J. Smith 123 U. S. R., p. 353, and the cases of the United States Supreme Court there summarized as follows: The Nichols, 7 Wall., 656; The Dexter, 23 Wall., p. 69, and the Annie Lindsly, 104 U. S., p. 185. In the case of the Maggie J. Smith, at page 355, the court said:

"Nor is there anything in the position that, when two vessels are approaching in opposite directions so as to involve risk of collision, and one of them violates the rule of navigation in directing its helm, and the other vessel sees it, she will be in fault if she does not also turn her helm so as to avoid the consequence of such departure from the rule."

Again, take the positions of the vessels after they had changed their courses—that is after the Argo ported

and gone to starboard, and the Dumois had starboarded and gone to port across the path of the Argo, what was then the duty of the Argo and what that of the Dumois? The regulations and illustrations of the Board of Supervising Inspectors, at pages 79 and 80 answer, that it was the duty of the Dumois to put her helm to port (not to starboard as she did) and pass astern of the Argo (directly the contrary of what she did do) while it was the duty of the Argo to continue on her course or port her helm if necessary to avoid the collision, both of which she did do.

It is therefore clear Captain Brown, in all respects, observed Rule 18 of Sec. 4233 of the Revised Statutes when he blew one blast of his whistle and ported his helm to pass to his starboard, and that Lumbard, the pilot of the Dumois, violated this law when he blew two whistles, starboarded his helm and put his vessel across the path of the Argo, and before she can excuse herself she must show that this breach of the law did not and could not have caused the collision. This was directly declared in Belden vs. Chase, 150 U. S. R., p. 699, as follows:

"And while under Rule 24, in construing and obeying the rules, due regard must be had to all dangers of navigation and to any special circumstances which must exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger, the burden of proof lies on the party alleging that he was justified in such departure. The Agra, L. R. 1 C., 501; The General Lee, Irish L. R. 3 Eq., 155. Indeed, in the Agra, it was ruled that not only must it be shown that the departure at the time it took place was necessary in order to avoid immediate danger, but also that the course adopted was reasonably calculated to avoid that danger. *And it is the established rule in this court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so.* The Pennsylvania, 19 Wall., 126, 136; Richelieu Navigation Co. vs. Boston Insurance Co., 136 U. S., 408, 422."

See also The Britannia, 155 U. S., page 143, where the above doctrine is declared and the latter part of the above paragraph is quoted in full. See also The Victory vs. The Plymothian, 168 U. S., p. 428.

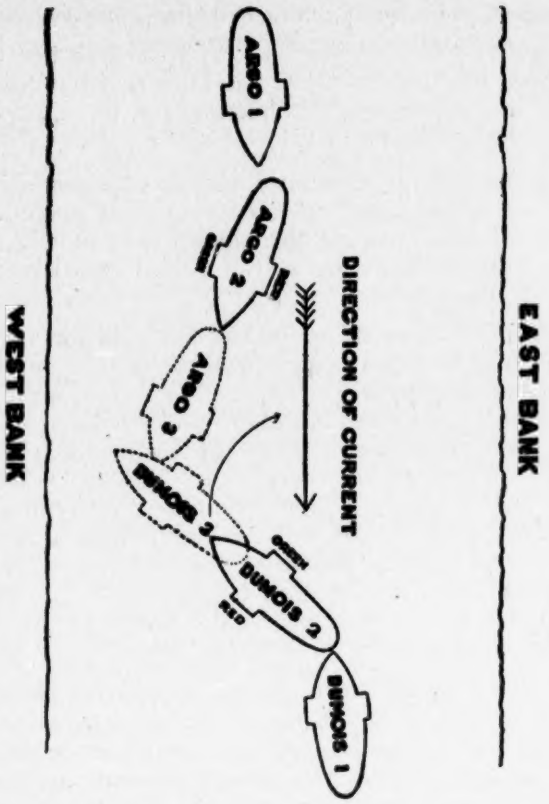
Rule 24, above referred to and which is invoked in this case, was discussed by the United States Supreme Court in The Maggie Hammond, 123 U. S., page 349, where the court said :

" The rule applies only where there is some special cause rendering a departure necessary to avoid immediate collision, such as the shallowness of water, or a concealed rock, the approach of a third vessel, or something of that kind."

None of these things prevail here, for the enlarged chart shows from 26 to 45 feet of water right up to the eastern shore, and the evidence shows the Day Dream and the lugger alongside of her only occupied from 40 to 50 feet, which would leave plenty of room for the Dumois to pass to the westward of the Day Dream and its lugger. Certain it is, that under no circumstances was it necessary for her at any time to have shot out in the river to the middle thereof where she says the collision took place, to pass said luggers and Day Dream, even if these latter, tied to the shore, are to be considered as "the approach of a third vessel," which we deny.

Even if, according to the theory of the Dumois, it was necessary for her to swing out in the river to pass the Day Dream and luggers, she then had the Argo on her own starboard bow and then it became her duty to keep out of the way of the Argo, and to do so, she should have ported her helm, and gone to the starboard at least after she was far enough out to clear said Day Dream and luggers, while the Argo should have con-

tinued her course as she did, and no collision would have been possible, as the following diagram will show:



The court quotes extracts from the evidence of Captain Brown to show he was in fault in not stopping his vessel and reversing, but—we think—it fails to appreciate, certainly to note—what we also think—is a very satisfactory reason for doing so. After stating that not 15 seconds elapsed from the time the signals were crossed by the Dumois (p. 63)—which was the beginning of the danger—to the time the vessels came together,

and that the Argo's speed could not be perceptably checked in that time, and in stead of stopping and backing, at p. 64 further said: "I thought when he rang the alarm and reversed that he would stop the headway of his ship and get me clear of him, the velocity I was going, him 10 miles an hour and me going 20 miles an hour. * * * And at page 65 said:

Q. When he crossed your signal, and you blew the single blast and put your helm hard aport, if you had undertaken—could you then, owing to the closeness which the vessels were together, could you have stopped and avoided a collision? A. No, sir, it was impossible.

Q. What was your judgment when you blew your whistle the second time and put your helm hard aport, as to what was best that could be done under the circumstances? A. That was to go ahead.

Q. Then I understand you to say, that, considering all the circumstances, the closeness of the vessels together, that it was your judgment, then and there, that the best for both to have done was for you to go ahead and throw your vessel to the starboard, put your wheel aport and throw it (vessel) to the starboard? A. Yes, sir, my judgment called for that in a tight place like that.

And yet the court says, "the master of the Argo (without telling why) believing in the speed of his vessel, and that he could run around and pass to the right of the Dumois in any event kept his course until he struck the Dumois and sunk his vessel." And that the master was justified in his belief, that the Argo (after the crossing of the signals by the Dumois,) could not have stopped and thereby avoided the collision, is also shown by the evidence of Orkney, the engineer, who, at page 73, said, the Argo would run half a mile after steam was shut off, and that, even if shut off and the engine had been reversed, there was not time, after the Dumois blew two signals crossing the signal of the Argo, for the Argo (which he says was making 200 turns per minute and 18 miles per hour) to have avoided the collision by stopping and backing.

And, as we have hereinbefore shown, after the Dumois crossed the signal and headed to cross course of the Argo, under said Rule 19 of Sec. 4233 U. S. and the regulations and illustrations of the Board of Supervising Inspectors, it was the duty of the Dumois to port "her helm and pass astern of the Argo, *while the Argo should continue on its course or port its helm*," but not to stop and back. This is the very opposite of what the court says was the Argo's duty to do.

One of the latest decisions in a collision case is that in the New York Connemaugh case, decided by the United States Circuit Court of Appeals, for the Sixth Circuit, and reported in the 82 Fed. Rep., p. 819. This collision occurred in the Detroit river, a short distance below the City of Detroit, and at a point where the river (according to the chart) was a little over half a mile wide, and resembles the collision in this case, and especially in the situation and relation of the colliding vessels just before the collision, when Rule 19 of said Sec. 4233 was applied. It gave the New York the character of the preferred steamer, and it does the same for the Argo, and more especially after the Dumois starboarded her helm, because the rule declares the vessel having the other on her own starboard must keep out of the way of the other, the very opposite of which the Dumois did.

In the New York case both vessels were on a port helm just before the collision, the Connemaugh following the tow. The latter signaled three different times for permission to pass to the starboard instead of the port side, and without receiving the consent or a reply of any kind, starboarded her helm and ran across the bows of the New York. Counsel contended that the New York, if she did not give consent to a starboard helm on the part of the Connemaugh, the signals of two blasts of the whistle, repeated by the Connemaugh three times, should have been answered by one blast of the New York's whistle; but the court holds the Connemaugh had no right to starboard under the circumstances, and that this was not a case where "silence gives consent," and that the New York was not obliged to give such signal.

The vessels were on parallel courses, says the court, and would have passed each other safely had the Connemaugh held her course, which the New York had a right to expect she would do. It was contended the Connemaugh was in danger of running into the tow of the Burlington (intervening between the two vessels) by holding her course, and that a starboard helm was necessary, and that under said Rule 24 she had a right to depart from rules and starboard her helm; but this claim was not allowed, although the Connemaugh was very close following upon the tow which she was seeking to avoid. The tow, then, in the New York case, represents the part counsel for the defense in this case seeks to make the luggers play. It is not disputed that the luggers were made fast to the shore. The Dumois claimed when she blew her signal of two blasts, which the Argo answered with one, that she wanted to go to port, but the Argo's one blast was notice to her that she did not have said Argo's consent and a declaration that the Argo would hold her course.

The Dumois claimed when she first sighted the Argo the vessels were half a mile apart, and hence the Dumois was half a mile from the luggers when she starboarded her helm. This, then, was the danger, and the only danger set up in justification for violating the rules to prevent collisions. We can see some excuse for the starboard helm of the New York with the Connemaugh running close in the wake of a tow, for naturally the master would want to get out of such a position; yet the court decided he had no right to starboard his helm without the consent of the New York.

There was a very good reason why the New York should not be required to consent to the change of course on the part of the Connemaugh. The parallel courses —both vessels having the other's red light—did not involve any risk of collision. The change the Connemaugh asked to make would endanger the New York, and she was not required to place herself in danger to take another out. The Connemaugh changed her course without the consent of the New York, and of the two

evils took what must have appeared to her was the least, and in doing so ran across the bows of the New York and was lost. To uphold the Connemaugh in this case would be equal to saying, to get out of the danger of hurting A you can take a desperate chance of injuring B, and B, not knowing of your intention, must sufter if he does not keep out of the way, notwithstanding B is doing nothing wrong and is going ahead about his business in a lawful way. This is not the law. Rule 24 authorizes a departure from the previous rules of the collision act to avoid immediate danger, but it does not justify injuring someone else to save yourself, and then have the innocent stand the damage.

But when the position of the luggers in the Argo case is considered as playing the part of the tow in the New York case, the proposition is absurd. The Dumois had lots of room—she was not within half a mile of the luggers when she sighted the Argo and starboarded her helm. The luggers were tied to the bank and the Dumois had an abundance of room and water to pass without changing her course at all. It is very certain it was not necessary to cross the middle of the river and the course of the Argo to avoid the luggers, as the court would have to find to excuse the Dumois for her starboard helm. There was a space of at least 1,150 feet between the course of the Argo and the luggers, and with no obstruction in the way there was no necessity for crossing the bows of the Argo, and Captain Brown could not be expected to anticipate such an insane move on the part of the Dumois. Even after the Dumois had starboarded her helm, Brown had a right to expect the Dumois would not violate Rule 19, and to believe the Dumois would go astern of the Argo. On the whole, it would be hard to find a case more favorable to the Argo than the New York case, and that case holds the New York free from blame when she did just what the Argo did, to-wit, held her course and did not stop or attempt to stop. The Connemaugh had the New York on her starboard side, just as the Dumois had the Argo, after the former had starboarded and the latter had ported,

and the court holds it was the duty of the Connemaugh to keep out of the way, and the New York could not and was not bound to anticipate she would not do so. She had no right to try to cross the bows of the New York and might have gone astern of the tow, and the New York could not be held at fault for not stopping.

Again. A slight recalling of the facts as disclosed by the evidence on both sides will show how unfounded is the pretense of the Dumois that it was necessary to starboard her helm and run out into the river in order to prevent running into the luggers tied at the bank. According to the evidence of both sides the collision occurred below the place where the luggers were at the bank, and according to the evidence of the Argo she was to the westward of the course of the Dumois, and according to the evidence of the Dumois the Argo was dead ahead—both her signal lights being in view. Now, according to the evidence of either, the Argo having passed the luggers before the collision occurred, why was it necessary for the Dumois to starboard to pass the luggers, which the Argo had already passed?

And equally unfounded is the assertion that the Argo, because of her speed, was a dangerous craft, and hence a menace to commerce. Such an argument would absolutely prohibit any improvement in the speed of vessels and would render the modern steam vessel an impossibility.

Equally unfounded is the statement that the "Argo was not constructed so that her speed could be checked when required by the rules of navigation, or that she could be backed within any reasonable time after sighting danger." All there is in the case on this point is what is stated in the pleadings, to-wit, that her backing power was slight (but there is neither allegation nor proof of any kind that she could not stop and back as alleged), but this means that her backing power was slight as compared with her power or ability to speed ahead, and this is true of all fast steamers. They are made to steam ahead. The shap of the hull, and especially that of the bow as compared with that of the stern,

the construction of the propellers—speed wheels—and in fact the entire construction of the vessels indicate this. Like the Campagnia, the Lucania, the Teutonic, the Majestic, the St. Louis, the St. Paul, and still later the wonderful William the Great, which sustained the wonderful speed of 22.35 knots for an entire passage across the ocean. Surely no sane person would for a moment contend these were dangerous and unfit to pursue their business because they did not possess the same facility to run 22 knots backward, as forward. It is true of every fast vessel that her ability to go backward is slight compared with her ability to go forward. One of the best proofs of what is here stated is the fact that the Dumois, whose forward speed, it is said, was only from nine to ten knots per hour when under full steam, was unable to stop her forward motion against a strong current, even after it is said her engines were reversed full speed astern, and continued her forward course way beyond the Argo, going up the river entirely out of sight, according to the evidence of her first officers three or four lengths, and according to the evidence of the Argo half a mile before she was stopped. But even the comparative slight backing power of the Argo under no circumstances would justify the Dumois in suddenly wrongfully and illegally thrusting herself across the bows of the Argo.

And the facts of the case show the Argo was not running as fast as her master imagined, nor "recklessly" as the court observed, for the night was clear and there was plenty of water and no crowd of vessels. She left New Orleans on the evening of January 27, 1897, at 7 p. m., and had hastened all the way. The collision occurred a few minutes past 12 o'clock, and the point of collision, as shown by defendant's pleadings, was 85 miles below the city, while the map shows it was less than 80 miles, and this would give her speed at 16 miles per hour, or the speed her builders—Herreshoffs—say she was capable of making, and this would be in these times ordinary speed for any steam craft unless it was a scow or a tub.

It is therefore clear that neither Rule 21, as to slacking speed or backing, nor Rule 24, in reference to varying from the general rule in special cases, have any application to the facts of this case, for there was no danger of collision when the Argo blew her first whistle, because at that time, as we have shown, the Dumois was to the Argo's left, as was disclosed by her red light, and according to the evidence of the Dumois the Argo was dead ahead, as was disclosed by seeing both of her signal lights, when under Rule 18 and the diagrams and illustrations on page 78, it was her duty to port her helm —just as the Argo did—and pass on the port side of the Argo, where there was no possible chance of a collision, and because there were no special circumstances in this case requiring such a departure.

The only possible risk of collision was when the Dumois crossed the Argo's signal and wrongfully threw herself across the course of said Argo—a thing which Captain Brown says (at page 58) no sane man would attempt to do, and which, after 40 years' experience on the river, he has never known anyone to attempt to do, when it was her duty not to have put her helm to star board as she did, but to have put it to port and passed to the left of the Argo. And if it is said she had to swing out from the eastern shore to pass the luggers, which we again deny (for the mate of the Dumois says she was 500 feet from the bank, and the luggers occupied from 40 to 50 feet, leaving 450 feet clear, and there was deep water right to the bank), then it was clearly her duty to have stopped and backed without changing her course, and not to have attempted to cross or swing out at all until the Argo had passed. (The Atlas, 10 Black ford, 459.) In any event her forward motion with a star-board helm was radically wrong, and at this point of time, when the Dumois did throw herself across the course of the Argo, she was so close to the Argo that the latter could neither slacken her speed or stop before the vessels would come together. This is apparent from the evidence of both parties. Steam might have been shut off, it is true, and the engine started backwards,

but, as the engineer of the Argo shows, even when this is done she would go forward for a long distance before her forward motion would be stopped, just as the Dumois did when she was reversed full steam backward.

Under these circumstances and at this instant of time, Captain Brown's judgment was that he might, by putting his helm hard to port and continuing his speed, pass in front of the Dumois, avoid the collision and prevent being cut in two, which he thought might occur if he tried to stop. In this, it is true, he was mistaken. But this judgment was forced upon him by a condition of things brought about by the Dumois. In other words, he was put in *extremis* by the conduct of the Dumois, and for any damage which might result from such judgment the Argo is not responsible, for the proximate cause of the collision was the conduct of the Dumois, and the mistaken judgment formed by Captain Brown while in *extremis* by reason of the wrongful conduct of the Dumois.

This principle has often been decided. In the Elizabeth Jones, the Supreme Court, quoting from an English case (Bywell Castle, 4 P. D., 249), said:

"When one ship has, by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame if she does something wrong and has not been maneuvered with perfect skill."

See also the Maggie J. Smith, 123 U. S., p. 349. The Nacoohee, 137 U. S., p. 340. The Blue Jacket, 144 U. S., p. 391.

There can be no doubt of the fault of the Dumois in crossing the course of the Argo. This was in direct violation of Rule 18 of said Sec. 4233, and in direct violation of the "standing rule" on page 78 of the rules and regulations prescribed by the Board of Supervising Inspectors of Steam Vessels, of January, 1896, even if the Argo was dead ahead, "meeting end on," for the Dumois, according to the evidence of her mate on watch, was 500 feet from the eastern shore and there was ample room for each vessel to pass on the port side of the other, and the contrary move on the part of the Dumois is alone

sufficient to account for the collision. In this situation the language of the Supreme Court in the case of the Oregon, 158 U. S., at the bottom of page 197, is of great importance in this case:

"Where one vessel is clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter which can only be rebutted by clear proof of a contributing fault."

As a result of the foregoing we think we have shown that from the time vessels came in sight of each other to the time of the collision the Argo was at no time in fault, and the Dumois, during all of said time, was in fault in everything she did, that is:

First. The Argo being the descending boat in the middle of the river, and the Dumois being the ascending vessel toward the eastern shore, said Argo was not in fault in blowing the passing signal of one blast of her whistle, and said Dumois was in gross fault in crossing the signal of the Argo with two blasts of her signal. See "Third Situation" and diagram on page 79 of said Pilot Rules.

Second. If the Argo was not in the middle of the river, but nearer the eastern shore, still she was not in fault in blowing a passing signal of one blast, to pass to the right, because both of her signal lights were visible to the Dumois ("head and head"—see said Regulations, p. 72), while the latter was 500 feet from said shore, giving ample room for the vessels to pass on the port side of each other, and the Dumois was in gross fault in crossing the signals of the Argo, starboarding her helm and crossing the Argo's course, and in doing so violated "a standing rule" of the Supervising Inspectors of Steam Vessels (a rule that has the force of a statutory enactment—Belden vs. Chose, 150 U. S., 698). See "First Situation" and diagram, page 78 of said rules.

Third. That the Argo was not in fault when she again blew her signal of one blast, still insisting in going to the right, and porting her helm accordingly.

Fourth. The Argo was not in fault under the circumstances in not slacking her speed, stopping or backing, not being in the sense of the law the approaching vessel, and not having, after she was cros-signaled by the Dumois, sufficient time to do either, because, as shown in the "Fifth Situation," it was not the duty of the Argo to slacken speed, stop or back, but to continue her course, as she did.

Fifth. If in the latter respect it should in any manner be claimed the Argo was in fault (which we deny), then she was put in extremis by the wrongful and sudden change of course by the Dumois in thrusting herself in front of the Argo, and for any want of proper maneuver on the part of the Argo (if such there was, which we also deny) the Argo is not responsible.

THE NEXT PRINCIPAL QUESTION IS, WHAT WAS THE VALUE OF THE ARGO, AND WHAT DAMAGE HAS THE LIBELLANT SUFFERED?

The petitioner complains of the decree of the Court of Appeals in as to said valuation.

First. Because the decree of the lower court is for too small an amount, and under the evidence should have been for at least $20,000 with interest from the date of the loss, to-wit, January 28, 1897.

Second. That in no event should the amount awarded libellant by said decree have been for less than $15,000 (on the basis of which one-half interest in said Argo was sold to be delivered the day after her loss), with interest from said date of loss on January 28, 1897.

In examining the facts on the question of damage and loss it is prosper to bear in mind the law on this subject, which, briefly stated, is as follows: It is not what A or B would have given for the Argo, or what she would have sold for at forced sale, but what was her value in open market? The law on this subject has been stated in collision cases as follows: In the case of the Colorado, 1 Brown's Ad. Rept's, the court said:

"The vessel being a total loss, the value just before the collision is the measure of damages. The difficulty is to ascertain that value. The criterion is, what would she have brought in the market, not under the hammer at forced sale, but in the ordinary course of sales of such property? (Londes on Collision, 141 to 146; 1 Parsons on Shipping and Ad., 452.)"

In "The Atlas," 93 U. S., 310, the United States Supreme Court said:

"Satisfaction to the libellant for the injury sustained is the true rule of damages in a cause of collision, by which is meant that the measure of compensation shall be equal to the amount of injury received, and that the same shall be calculated for the actual loss occasioned by the collision, upon the principle that the sufferer is entitled to complete indemnification for his loss, without any deduction for new materials used in making repairs, as is prescribed in the law of marine insurance. Complete recompense for the injury is required."

The appearance, character, style and condition of the Argo are fully disclosed by her picture, her papers, and the evidence of the witnesses to be found in the record, from which it well appears she was slightly over 95 feet long, 15 feet beam, with 6 feet of hold, and when built in 1878 was called the Leila, with name afterwards changed to that of the Argo; and that, though built in 1878, she was subsequently rebuilt, received a new boiler, which as late as January, 1897, stood a hydrostatic pressure of 186 pounds and was allowed a working steam pressure of 124 pounds to the square inch, and in 1893 received a new hull, deck and other matters at a cost of $10,000 (Babcock, p. 140), making her in all respect a better boat than she was when originally built, and at the time of her loss, "from keelson to truck" was in first-class condition, and her outfit, furnishings, etc., were of the very finest, while her speed when pushed was 21 miles an hour.

What was the market value of such a craft, in such a condition and of such speed? What would be "complete compensation for the injury which the libellant has

sustained in her total loss? Certainly nothing less than $20,000, with interest from the date of said loss, and in no event not less than $15,000, for which one-half was sold, for which the money was to have been paid the day after her loss, had she not been lost by the sole fault of the claimant.

And first we will refer to the evidence of the claimant on this subject.

Captain Woodward was the first witness examined, and while it is true he says he made an examination of the Argo with the view of ascertaining her value, it is apparent from his evidence that such examination must have been quite superficial, for he says she was a high-pressure boat, and that to go to sea she would have to have the addition of a condenser (p. 287), whereas her official papers show she had a compound condensing engine (p. 175), and Orkney, her engineer, says she had a compound keel condenser (p. 68). And, strange as it may appear, Captain Woodward further said speed of 21 miles an hour would not be an element of her value (p. 287), while to a yachtman speed is the principal element of value and the great item in the cost of construction.

With such an imperfect knowledge of the vessel, Captain Woodward says he thought she might have sold for $8,500 (not that this was her value), and that he would not have offered more; but says frankly that that amount does not fix the value of the boat, but that he would not have offered more (p. 280) (evidently with a view of buying her and again selling at a profit); but when his attention was called to the fact that she had been sold for $15,000, to be delivered the day following that on which she was lost, he says that sum would fix her value (p. 281).

The evidence of the Hereshofis (p. 306), the original builders of the Leila (which was afterwards called the Argo), has also been taken, and it declares the original cost of the Lelia was $18,000, and to duplicate her would cost $20,000, and that if she had been kept in good repair one-third of the last amount should be deducted,

which would fix her value at their place in Bristol, R. I. (but not in New Orleans, and it would cost a large amount to bring her here) at $13,334. But the building of a new hull, strapped and braced with iron braces and supports beyond what she was when built, with a new deck, made her, in fact, a new boat, and as the witnesses who were conversant with this construction say, made her a better boat than when she was new.

The evidence on the subject of value is as follows:

W. I. Babcock, manager of the Chicago Ship Building Co., and of large experience in the building and repairing of vessels, says she was worth $17,500 (p. 140).

David M. Cochrane, a steamboat man of large experience, who carefully examined the Argo in Chicago in 1895, in the fall, places her value at the time of her loss at $18,000 to $20,000 (p. 143), and says that to duplicate her anew would cost from $26,000 to $30,000. Not to duplicate her as she was when originally built, but as she was in 1895, when, owing to having received a new hull and other things, she was a "better boat than when built."

Frank Huettman, of Detroit, who was the builder of yacht engines and machinery for steam yachts, and who had done all the work on her while she was in Detroit, and who was on her in Galveston, Texas, in 1896, for 10 days and took apart her machinery, put in a new truss bearing and did other work on her, and thereafter replaced all her machinery and made three or four trips on her, finding her in first-class condition, says that on January 28, 1897, her market value would be from $25,000 to $30,000 (p. 122).

Timothy E. Tarsney, of Detroit, an attorney at law and a proctor in admiralty, but prior thereto for seven years a practical marine engineer on the western lakes, on January 28, 1897, puts her value at $18,000 (p. 125), and on cross-examination said:

"I base my opinion as to the value of the Argo when she was lost in January, 1897, upon my knowledge of the construction and equipment of steam vessels, a practical experience as a marine engineer for seven

years, a practical experience in machine shops and in the operation of stationary engines, and my experience as proctor in admiralty, and knowledge generally acquired from persons familiar with steam vessels, and more particularly from personal observation and inspection of the yacht Argo, as stated in my answer to the third direct interrogatory; and about three weeks ago a client of mine sold her steam yacht "Azalia" for a consideration of $18,000. I was consulted concerning the sale. In my judgment the value of the Argo exceed that of the Azalia (p. 127)."

William Howie Muir, of Detroit, a manufacturer, has had no experience in buying, selling or building yachts, was acquainted with the Argo when she was called the Leila, and before she was rebuilt at Chicago at a cost of over $6,000 (p. 146), and knows she was sold for $9,000 or $7,000 to the Chicago people at a sacrifice because the parties who held her had no use for her; but he never saw her thereafter and can put no value on her at the time she was lost (p. 128).

Safford S. Delano, of Detroit, treasurer of a car company, has had no experience in buying, selling or building yachts, but knows the Leila was bought in 1884 for $10,644.03, and was sold in 1892 for $7,000—a price far less than her value—because the concern which owned her was going out of business and was willing to sell her at a great sacrifice rather than be bothered with her; but these sales were all made prior to the rebuilding of the Argo at an expense of $10,000 (p. 140), after which the witness says he is incompetent to put any value on her at the time she was lost (p. 131).

Thomas E. Miller, president of Miller Bros.' Dry Dock Company, Chicago, Ill., helped to rebuild the Argo in 1893. The company's bill for carpenter work alone was $5,746.32 He did not remember what the "other work cost," done at that time and consisting of "a great deal of machinery, boiler and blacksmith work was done at same time. Plates were put under the decking to strengthen her sides, and other work was done." (Record, pp. 145-6.) But Mr. Babcock says

Miller Bros.' bill was about $10,000, and by this he means, undoubtedly, the total cost of rebuilding which was done at Miller Bros.' dry dock, for he O. K.'d the bills (Record, p. 142). Mr. Miller places the value of the Argo at $20,000 to $25,000 (Record, p. 146).

Edward H. Gillman, of Detroit (p. 135) has had much experience in buying and selling steam yachts and steam vessels, and knew the Leila before she was sold to the Chicago people, and when she was running from Detroit to Grosse Pointe, for whom he made a careful examination of her at the time of their purchase, when said Chicago people paid $7,000 or $9,000 for her, and at which time he says she was positively worth from $12,000 to $15,000. This, of course, was before she had been rebuilt by said Chicago people at the above expense of $10,000, after which this witness never saw her, and hence can put no estimate on her value at the time of her loss; but says if she was in as good condition—and she was in far better condition after receiving a new hull, deck, and other repairs—as she was when she was sold as the Leila to Chicago, she was worth from $12,000 to $15,000, and that a vessel of her class could not be built for less than from $30,000 to $35,000.

Captain A. Thomas, of New Orleans (p. 188), who is familiar with boats, who has been a dry dock man, a pilot and captain, and who has built boats and owned vessels, carefully examined the Argo a few days before she was lost, and found her in first class condition in every respect, and considered her worth from $25,000 to $30,000.

In addition to all of the above, the evidence of Bagley (pp. 185-6) and Springer (p. 184) shows that the latter had concluded a sale of one-half of the Argo to the former for $7,500, and that she was to have been delivered and the money paid for said one-half interest on the day following that on which she was lost and on her return to the city. This was an actual sale in this market, and under the law as declared in "The Atlas," 93 U. S., 310, the libellant is at least entitled to compensation at least this amount.

See also Springer's evidence (p. 181).

Some evidence has been offered to show libellant at one time before she was lost offered to sell her for $12,000 and allow a commission, but the same evidence (Gen. Miller) shows it was because the libellant had become tired of a yacht and wanted to get rid of her badly, and his own evidence shows it was because he was in need of money, and wanted to avoid the expense of taking her back to Detroit (p. 237). But this is not legal evidence.

From all the evidence we think it will appear that the value of the Argo at the time of her loss was not less than $20,000, for which the libellant should have judgment, with costs.

When we take the various amounts given by each of the witnesses examined and add them together and divide the sum by the number of witnesses examined, the result will show how entirely wrong is the amount awarded by the court. This will appear as follows:

Woodward, - - - - - - - - -	$ 8,500
J. B. Herreshoff, cost, $20,000; depreciation, from one-third to one half, say, - -	11,667
N. G. Herreshoff, cost, $20,000; depreciation, one-third, - - - - - - - -	13,334
Bakcock, - - - - - - - - -	17,500
Cochrane, from $18,000 to $20,000, say, -	19,000
Huettman, from $25,000 to $30,000, say, -	27,500
Tarsney, - - - - - - - - -	18,000
Miller, Thos. E., from $20,000 to $25,000, say,	22,500
Muir gives no valuation, but says the Leila was sold (this before receiving a new hull, deck, etc) from $9,000 to $7,000, say, -	8,000
Delano gives no valuation, but says she was sold for less than her value because of no longer use (this before receiving new hull, etc.) for $7,000. - - - - - -	7,000
Cillman examined her as to value before receiving new hull, etc., when sold to Chicago in 1892, and valued her at $12,000 to $15,000 in 1897, - - - - -	13,500

Thomas examined just before her loss and valued her from $25,000 to $30,000, say,	27,500
Miller says libellant offered to sell her for, -	12,000
Springer valued her at, - - - - -	20,000
Bagly closed bargain for half at $7,500, making,	15,000
Total valuation, - - - - -	$241,001

And this sum divided by the total number of witnesses examined (15) gives a valuation of $16,066.73⅓

But if we deduct the amounts given by Muir and Delano, who were not experts in such matters ($8,000 and $7,000, or $15 000) from the above $241,001, we get valuation of $226,001, and this divided by the number of the other 13 witnesses gives $17,384.

In view of the foregoing we assert with confidence that under no system of calculation or reasoning can the amount of $15,000, without interest awarded by the Court of Appeals be sustained as the valuation of the Argo when destroyed by the Dumois on January 28, 1897. No interest was added by that court. Certainly libellant is entitled to interest on his loss from the date of it.

And surely not when the uncontradicted evidence shows one-half of the vessel was actually sold, to be delivered the day after that on which she was lost, at a valuation of $15,000, and in the market where she at the time was, while the best evidence in the case conclusively shows her value at said time was fully $20,000, nothing less would be compensation for her wanton destruction by the Dumois and the loss sustained by the libellant—that compensation which the Supreme Court, in "The Atlas," 93 U. S., p. 310, declared one thus injured was entitled to recover.

Evidently the learned court, in assessing the damages, did not apply the correct rule for finding the value of a vessel lost in a collision, when the vessel is a total loss. The question is, what was the value of the Argo just before the collision? This question cannot be answered by taking the original cost of the Leila and deducting for depreciation occasioned by use and age.

First—Because the Leila, we have shown, when rebuilt and called the Argo, was a better boat than when first built.

Second—Because such method of finding value is applicable only when the vessel lost has been constructed for a special purpose not in the line of ordinary shipping, or when there is no other evidence of value offered to guide the court.

There was nothing peculiar about the construction of the Argo and she was useful for many purposes, as her license and the evidence of Mr. Bagley and Mr. Thomas shows.

It will be admitted that the value of the Argo should be found from the best evidence of that value, and not from the "next best" or the poorest evidence of her value. The best evidence of the value, according to the rule in the Colorado case above quoted, is found in the depositions of T. E. Tarsney, Thos. M. Miller, W. I. Babcock, David M. Cochrane, Frank Huetteman, N. R. Bagley and Capt. A. Thomas. All of these witnesses knew the Argo, testified she was in first-class condition, and gave evidence of her value. Mr. Thomas and Mr. Bagley saw and examined the vessel a few days before or "just before the collision," and they placed her value at $25,000 to $35,000. (Record, pp. 185, 189)

"The correct rule upon this subject when the vessel is a total loss seems to be that the market value of the vessel just before the collision is the proper measure of damages; that the best evidence of such value is the opinion of competent persons who knew the vessel shortly before she was lost, and the next best evidence is the opinion of persons conversant with shipping and the transfer of vessels."

The Colorado 1 Browns Adm. p. 413.

If this rule is applied, as it should be, to the case at bar, the evidence of J. B. and N. G. Herreshoff will be found incompetent and hence should not be received as establishing the value of the Argo. The same thing

may be said of all the evidence introduced for the claimant on the measure of damages.

Therefore petitioner prays that a writ of certiorari be duly granted to bring up the record herein from the Circuit Court of Appeals for the Fifth Circuit and that thereafter the cause be heard in this Honorable Court, and that after due proceedings had judgment be rendered in favor of petitioner for the full value of said Argo, with interest from the date of her loss and all costs of suit, and for such other and further relief and redress as to right and justice appertain and as the court is competent to give in the premises.

Respectfully submitted,

RICHARD DE GRAY,

Proctor for Petitioner.

MAR 11 1899
JAMES H. McKENNEY,
Clerk

No. 413

Brief of De Gray for Petitioner

SUPREME COURT

OF THE UNITED STATES.

Filed Mar. 11, 1899.

OCTOBER TERM 1898.

No. 413.

OSCAR M. SPRINGER,
Libellant and Petitioner.

vs.

STEAMSHIP ALBERT DUMOIS;
ANDERS JAKOBSEN,
Claimant.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR LIBELLANT AND PETITIONER.

RICHARD DEGRAY,
Proctor for Libellant and Petitioner.

DETROIT:
CHAS. M. ROUSSEAU & SONS, PRINTERS, 40-44 WEST LARNED STREET.
1899.

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BRIEF FOR LIBELLANT AND PETITIONER.

STATEMENT.

The steam yacht Argo, of which said Oscar M. Springer of Detroit, Michigan, was the sole owner, lies sunk on the bottom of the Mississippi river, about 500

feet from its western bank (R. pp. 110-114), at a point about 80 miles below the City of New Orleans (R. p. 26), and is a total loss. The river at this place is straight, is 2,400 feet wide, and has deep water from bank to bank. (Chart of Mississippi river Commission.)

This sinking and loss was the result of a collision which occurred on a clear, starlight night, between the hours of 12 o'clock p. m. of January 27th, 1897, and 1 o'clock a. m of January 28th, 1897, between said steam yacht Argo, bound on a trip from the City of New Orleans to the jetties at the mouth of the South Pass of said river, and said steamship Albert Dumois, which was proceeding to the City of New Orleans. With the sinking of said Argo occurred the death of the late Faure Bourgenois de Blesine and the late Harrison P. Hester.

On the 28th day of January, 1897, libel was filed by said Springer in the United States District Court for the Eastern District of Louisiana, in rem, against said steamship (R.p. 1), claiming said collision was solely caused through the fault of said Dumois and claiming damages to the extent of $40,000, and an intervening libel was filed by the crew of said Argo, respectively, claiming damages for the loss of their respective effects lost in said sinking (R. p 5); and thereupon said Anders Jakobsen appeared and claimed the said Albert Dumois as sole owner thereof (R. p. 8). And thereafter Marie B. Bourgenois de Blesine, the mother of said Faure de Blesine (as the party duly authorized under the jurisprudence of Louisiana to bring such suit), filed a libel in personam against said Anders Jakobsen, claiming the loss of her son was solely caused through the fault of said Dumois, and damages to the extent of $20,000 (R. p. 12).

Thereafter said Jakobsen filed his petition claiming the benefit of the limited liability provided for in the Act of Congress of March 3rd, 1851, and in Section 4263 of the Revised Statutes of the United States (R. p. 9), under which the Dumois and her pending freight were appraised (R. p. 12), the vessel released on bond (R. p. 17), and further proceedings against said vessel, freight, and her owner were enjoined (R p. 11); and thereafter monition was published directing all persons claiming damages to appear before a Commissioner duly named and make proof thereof, and enjoining proceedings against said steamship and her owner (R. p. 20); and thereafter, by agreement of proctors, said libel in personam of said Mrs. de Blesine was filed and treated in said limited liability proceedings as an answer to said proceedings (R. p. 16). And at a still later date Mrs. Genevieve Keplinger Hester, as widow of said Harrison P. Hester, filed claim under said monition, alleging his death was solely caused through fault of said Dumois, and claiming damages at $20,000 (R. p. 30).

At a still later date claimant of the Dumois filed an amended petition in more amplified form, giving the facts of the case case as claimed by him, and again praying the benefit of said limited liability laws (R. p. 25), to which as well as to said original petition Springer filed an extended answer, stating the facts as claimed by him, and among other things in said answer, surrendered the wreck of said Argo and claim for charter money for the trip or voyage on which she was lost, and prayed for the recovery of the value of said Argo as in his libel set forth (R. p. 36), the substance of which amended petition and the answer thereto and to said original petition are as follows :

Said amended petition stated in substance: (1) That said Dumois, while proceeding on a trip from Port Limon, Costa Rica to New Orleans, came in collision with the Argo. (2) That said Dumois was properly manned and equipped, etc. (3) That at the time of said collision said Dumois had arrived at a point 80 miles below New Orleans and was proceeding as close to the east bank as it was safe to go, when her lookout, pilot and second mate discovered the lights of a steamer coming down said river close to said eastern shore, "head and head" and a little to the starboard, when the Dumois's lights were burning brightly, and that on discovering said lights—which were those of the Argo—and before any signal had been given by her, said Dumois gave two distinct blasts of her whistle, indicating that she desired to pass the Argo to her left, starboard to starboard, and put her wheel to starboard; that the Argo wrongfully crossed said signal with one blast of her whistle, and then said Dumois immediately repeated her signal and immediately thereafter caused three or more short blasts to be blown to indicate danger, and stopped and backed, but that said "Argo wholly neglected to stop her engines and back, but kept her course and speed until her pilot saw the green or starboard light of the steamship, when he attempted to pass ahead of her by putting his wheel hard aport, which brought the Argo in collision with the steamship, striking her at right angles on her starboard side about 10 feet abaft the stem, from which collision the Argo sank in a few minutes and became a total loss." (4) That the Argo carried no masthead light, but that all her lights were on the pilot house, the colored on the respective

sides and the white light on the forward end of the pilot house, all at the same height and so few feet above the water, which gave them the appearance of being at a greater distance off than they actually were, "tending to mislead (not that they did mislead) an approaching vessel." (5) That owing to the above location of the lights they were not visible until she cleared the tug Day Dream and her tow of luggers coming to a landing on the west bank half a mile above the steamship, which compelled her at the time of the first signal to pull from the bank to clear them, as she could not safely go between them and the bank or go closer to the bank, which the pilot of the Argo must have known, as he had just passed the tug and luggers. (6) That the Argo was on the east side of the river, out of her proper course for descending vessels, which was in the middle of the river, and was running at the dangerous speed of 18 or 20 miles an hour, and that her sudden appearance after the clearing of the tug and luggers at a distance of less than half a mile put the steamship in such extreme peril that her pilot was compelled to take instant action to avoid the collision, but the pilot of the Argo made no effort to avoid it by stopping the Argo's engines and backing her or by keeping her course or putting his wheel to starboard: (7) That the Argo was not sufficiently officered and manned, the only deck officer being Brown, who acted as master, pilot, mate, wheelman and lookout, and that, owing to the multiplicity of his duties he did not give proper attention to the navigation of his vessel. (8) That lacking two men to complete the crew for this trip to the jetties, the master took Hester and Blesine, who were not seamen; that said Hester took the manage-

ment and had charge of the Argo for the New Orleans Picayune, which had chartered her for the voyage, and as such had the right to give all orders, both of whom were drowned. (9) That the said collision was in no way caused by the fault of said steamship and was caused by the fault of the owner of the Argo and said Hester in not properly manning her, and by those charged with her navigation. (10) That though said collision occurred without fault, privity or knowledge of said petitioner, Springer, as owner of said Argo, has libeled the Dumois, claiming $40,000 damages, and the mother of said Blesine has filed a libel in personam claiming $20,000 on account of his death, and the wife of said Hester threatens to file libel claiming damages for his loss of life, and the crew of said Argo have intervened and claimed various small amounts (which are mentioned), and petitioner fears other claims will be made. (11) That under the circumstances petitioner desires to obtain the benefit of Sections 4283, 4284 and 4285 of the United States Revised Statutes and amendments thereof and supplement thereto, and to contest his liability and that of said steamship to any loss or damages resulting from said collision. (12) That for the purpose of obtaining the benefit of the above limited liability law offers stipulation for the value of said steamship and her pending freight for the benefit of those who had sued and those who may hereafter sue, etc. And affirming the prayer of his original petition, and that he may have the benefit of all proceedings theretofore had, further prayed that the Court decree said steamship was not in fault in causing said collision, and that all claims asserted or brought against him and said steamship may be rejected with costs; but in case

it should be decided both vessels were in fault, that the damages done said Dumois be allowed as an offset against any sum allowed in favor of libellant to the extent claimed in his answer to the libel filed herein, and that in case full damages should be awarded against said steamship in favor of the intervening libellants and the legal representatives of said Flesine and said Hester, that then the said Oscar M. Springer may be decreed liable for one-half of all such damages, and that any judgment he might recover against petitioner and his said steamship may be decreed to be compensated and extinguished to that extent, and for general relief.

To the original and the foregoing amended petition the libellant Springer, in substance, responded as follows: (1) Admitted said collision did occur in the river at the place stated, to-wit: about 80 miles below the City of New Orleans. (2) Denied said steamship Dumois was properly manned and equipped, and averred her officers and crew were unskillful and negligent. (3) Admitted that prior to the said collision said Dumois was coming up the Mississippi river, but about 450 or 500 feet from its eastern bank, at 10 miles an hour; and denied that her lookout, or mate, or anyone else, discovered the lights of the Argo close to the east bank of said river, or to the starboard of said Dumois; denied that said Dumois had a proper lookout forward, that there was a competent pilot and mate on the bridge keeping a vigilant lookout; denied that before any signal was given by said Argo two distinct blasts of said Dumois's whistle were given; denied that said Argo wrongfully crossed the signals of said Dumois, or crossed her signals at all, and averred that said Argo was going

down said river at the point stated in her proper place in the middle of the river, and when she had reached a point three-quarters of a mile distant her master and pilot (who was steering), and her lookout on watch, noticed the red and white lights of a steamer ascending said river in the proper place for such ascending vessel, and when she had approached within about half a mile of the Argo, still in the middle of the river, and before said Dumois had given any signal whatever, said Argo gave one distinct blast of her whistle, indicating she would keep her course and pass on said Dumois's left, when, not heeding said Argo's signal, said Dumois crossed the same with two blasts of her whistle, crossed the stream and the course of said Argo, shut out her red and showed her green light; that immediately upon said Argo's signal being crossed, said Argo again blew one blast of her whistle and put her helm hard aport to go wide clear of said Dumois, as in the judgment of her master and pilot it was best for all for her to do, but said Dumois continued and blew her danger signals, but only a second or two before the Argo struck her on her starboard bow, and thereafter said Dumois continued her course up the river for half a mile or more before she stopped, going rapidly past the Argo, which sank in four minutes, becoming a total loss and causing the death of Hester and Blesine, but no damages were done to said Dumois. (4) Admits said Argo carried no masthead light, and that her lights were on the pilot house, but denied they were on the same plane and that they were only a few feet above the water, and that they were misleading, and averred they were in all things the proper lights for a vessel of the Argo's class and placed accord-

ing to law, and were burning brightly. (5) Denied the lights of the Argo were not visible until she had cleared the tug Day Dream and luggers landed on the east bank of the river half-a-mile above said Dumois; denied said Dumois was compelled to pull out from said eastern shore to clear said luggers, and averred that if said Argo's lights were not seen it was the fault of the pilot of said Dumois; that there was fully 300 feet between the course of said Dumois and said luggers, which were landed at the eastern shore, and that at the time the course of the Argo was to the westward of that of said Dumois and in the middle of the river, and had said steamship not wrongfully left said eastern shore and crossed the Argo's course no collision would have been possible. (6) Denied the Argo was on the eastern side of the river and out of her course in the middle of the river, and that her speed of 18 miles an hour was dangerous or excessive; denied that her appearance was sudden and that she could not plainly and distinctly have been seen on that clear, starlight night a distance of less than half-a-mile; denied that said Dumois was at any time put in extreme peril by any action or fault of the Argo, and that her pilot was compelled to take instant action to avoid collision, and averred through want of skill the pilot of the Dumois took just the action to bring about the collision that did occur, by refusing to heed the two separate signals of one blast of said Argo's whistle, and crossing her signals and course, as already described; all of which was sudden, wrong and unanticipated, and put the Argo in extreme peril, and the judgment of her master and pilot in this situation was that the very best thing he could do, owing to the speed with which he was

going with the current, and owing to the fact that the Argo could not be stopped and backed in less than 10 minutes, was to put his helm hard aport, proceed with full speed and pass in front of said Dumois, and this would have been successful had said Dumois, after wrongfully crossing the signals and course of the Argo, stopped when she blew her danger signals; that at the time the lights of the Argo were burning brightly and were visible more than two miles, and if not seen at less than half-a-mile, as alleged, it was solely due to the insufficient lookout. (7) Denied that said Argo was not sufficiently manned; denied she did not have a skillful and competent lookout on duty; denied that there were any duties that rendered Brown (the Argo's master and pilot) incompetent to give, and that he did not give proper attention to the direction and steering of said Argo; and averred said Argo was not a large, ocean-going steamer, but a small pleasure yacht, 100 feet long and of 48 gross and 24 net tons burden, and only licensed to navigate lakes, harbors, sounds and rivers, and was engaged only on a short trip from New Orleans to the jetties and return, and said Brown was entirely competent to give and did in all things give proper attention to her navigation, and averred the full crew of said Argo was a master and pilot, one engineer and five crew, as her certificate of inspection will show, all of whom were on board of said yacht at the time, the said Hester and said Blesine acting as deckhands, for which they were competent. (8) Admitted said Hester and Blesine agreed to go and act as deckhands, for which they were competent; admitted said Hester had charge of the trip for the charterer with direction of said Argo, and that

said Hester and said Blesine lost their lives. (9) Denied the collision was in no way caused by the fault of said Dumois, and averred it was solely caused by her fault, and that she alone was responsible therefor and for the loss of said Argo and said Hester and Blesine. (10) Denied the collision happened and said loss and damage occurred without fault of the Dumois, and admitted the owner of the Argo had libeled the Dumois for $40,000 for her total loss, that Mrs. Blesine had filed libel in personam against the owner of the Dumois claiming $20,000 damages for the loss of her son, and that the other parties named had filed intervention claiming the amounts stated, for loss of personal effects. (11) Denied that said Dumois was entitled to the benefit of the limited liability provisions of the Revised Statutes of the United States. (12) Admitted the filing of said petition claiming the benefits of said provisions of said limited liability, and that said claimant had given bond for the value of said steamship and pending freight, and that she had been released.

And further answering said, that in case the Court should find said Argo was in any manner in fault in causing said collision, then he said that at the time thereof said Argo was under charter to The New Orleans Picayune Newspaper Co. to make a trip from the City of New Orleans to the jetties at the mouth of the Mississippi river and return for the price of $100, and was at the time under the management of said Hester, who was on board of her as said company's representative, no part of which had been paid, as said trip was broken up by said collision before the same was half completed, and that by said collision said Argo was sunk and com-

pletely lost; that there is no personal liability against respondent for any loss or damage to the Dumois, if any occurred (which is denied), nor to Mrs. de Blesine for the loss of her son, nor to said Mrs. Hester for the loss of her husband, nor to the other parties, nor was there any liability on the part of the Argo to said parties, or either of them, beyond the value of said Argo as she lies sunk at the bottom of the Mississippi river at said point of collision; and in and by said answer surrendered her as she lay sunk as aforesaid, and any claim he might have for said charter money, for the benefit of all parties who may in any manner have any claim against him or the said yacht Argo, and prayed for damages as in his original libel set forth.

After the evidence was fully taken and the case was being heard, Springer again made surrender of the wreck of the Argo and said claim for charter money for said voyage or trip on which she was lost (R. pp. 42 and 43), following the practice observed in 'The Great Western, 118 U. S., p. 524."

After due consideration by the court its conclusion was announced in an oral opinion delivered in presence of the proctors of all parties, which was to the effect that when the vessels first came in sight of each other the Argo was descending the river in the usual and proper course for a descending steamer, in the middle of the river, and the Dumois was ascending said river toward the eastern bank thereof and about 400 or 500 feet distant therefrom; that the Argo gave the first signal of one blast of her whistle to pass to the right of said Dumois —which was proper—and said Dumois wrongfully crossed signal with two blasts of her whistle, starboarded

her helm without any reason for a departure from the "rule of the road" (Rev. Stat. U. S., Sec. 4233), and crossed the course of said Argo, notwithstanding said Argo again gave a signal blast of her whistle, still claiming her right to pass to starboard, and ported her helm to go to the westward, when said Dumois replied with her danger signal, continuing her course in front of said Argo, causing the latter to strike her on her starboard bow, from which the Argo sank in a few minutes, and said Hester and said Blesine to be drowned, and thereafter said Dumois continued her course up the river until she disappeared from sight, and decreed said collision was solely caused by the fault of the Dumois, and awarded to libellant Springer $11,000 for the loss of said Argo, $5,000 to Mrs Hester, $2,500 to Mrs. Blesine, and to the crew of the Argo the respective sums by them claimed (R. p. 309).

From this decree claimant of the Dumois appealed to the United States Circuit Court of Appeals for the Fifth Circuit, assigning in substance, as error, that said collision was caused through the sole fault of the Argo, and that the amount awarded as her value was excessive (R. pp. 310 to 313).

An appeal was also taken by Springer, claiming the amount awarded him as the value of the Argo was too small (R. pp. 316 to 319), but no appeal was taken by Mrs. Hester or Mrs. Blesine, nor by the crew of the Argo, who were awarded the amounts claimed.

The United States Circuit Court of Appeals in part sustained both appeals, decreeing the damages sustained by Springer in his loss of the Argo were $15,000, and

those sustained by the Dumois were $185, and that the collision was caused by the mutual fault of both vessels, and that said damages should be divided, and adjudged that Mrs. Hester recover from the principal and surety on the release bond $3,000 as widow and $2,000 as tutrix to her minor child; that Mrs. Blesine recover from said parties $2,500, the crew of said Argo one-half of the damages by them respectively sustained, and that O. M. Springer, owner of the steamship Argo, do have and recover of said Anders Jakobsen, claimant, and Isadore Newman, surety, in solido, the sum of $7,500, subject to a credit of $92.50 in favor of said Anders Jakobsen and Isadore Newman for one-half of the damages sustained by the Dumois, and to a credit of one-half the amounts hereinbefore decreed in favor of Mrs. Hester and Mrs. Blesine, all of which credits aggregate the sum of $3,842.50 leaving a balance due on this decree in favor of said O. M. Springer, claimant, of the sum of $3.657.50, and that said Springer have execution only for said sum of $3,657.50" (R. pp. 323 and 324).

ASSIGNMENT OF ERRORS.

Of the foregoing decree, said Springer complains and makes the following assignment of errors:

1. Because it holds the Argo was mutually in fault in causing said collision, whereas said Argo was at the time desending the river in her proper place in the middle thereof and said Dumois was ascending said river to the left or port of said Argo, when said Argo gave one blast of her whistle indicating that she would pass on the left hand side of said Dumois, to which the latter responded with two blasts of her whistle, whereupon said Argo responded with one blast of her whistle and immediately ported her helm to go to her right, while said Dumois disregarded said whistle and wrongfully crossed the bow and course of said Argo and thereby caused said collision.

2. Because said decree did not find the value of said Argo to be at least $20,000, and because it did not allow interest from the date of the loss, or any interest from the date of the decree.

3. Because it directs that claimant of said steamship Dumois is entitled to deduct one-half of what he is adjudged to pay Mrs. Hester and Mrs. Blesine from the half damages first decreed to libellant as half the value of the Argo, and this in the face of the fact that petitioner made surrender of the Argo's wreck and claim for freight in his answer to the aforesaid amended petition (as was

done in the case of the Scotland, 105 U. S., p. 24), and again formally surrendered her with all sums due her on the trip on which she was lost, for the benefit of all parties in interest.

4. Because said decree does not increase the value of said Argo to at least $20,000

5. In case the above should be found untenable, then petitioner says there was nothing for said Court of Appeals to base its decree upon, as there were no facts found by the District Court.

The foregoing was substantially set forth in the petition filed herein for the writ of *certiorari* and was supported by the argument which follows; and said writ having been granted on October 17th, 1898, said argument is now here repeated and a reversal of the decree of said United States Circuit Court of Appeals, and decree in favor of libellant is asked for the full value of said Argo ($20,000), with interest from the date of her loss on January 28th, 1897, on the grounds in said argument set forth.

And here we think it proper to observe that of the foregoing decree of the United States Circuit Court of Appeals, no complaint was made by claimant by petition filed for a like writ, nor by brief filed in opposition to petitioner's application for said writ, and hence we take it, that inasmuch as under the 6th section of the Act of March 3, 1891, in all cases certified to this Honorable Court by its direction, its power and authority is the same as if they had been carried to said court by appeal or writ of error, that no complaint can now be made or error assigned by claimant of said Dumois as to the

decree of said United States Circuit Court of Appeals.

In fact this has been directly held in Hubbard vs. Todd, 171 U. S., p. 474, where the court, at page 494, said:

"This case belongs to the class of cases in which the decree of the Circuit Court of Appeals is made final by the statute, and having been brought up by certiorari on the application of petitioner below, is pending before us as if on appeal. As respondents did not apply for certiorari, we shall confine our consideration of the case to the examination of errors assigned by petitioner."

And after having considered the case the court closes its opinion, at page 505, as follows:

"Whether or not there was error in the decree of which respondent might have complained, we do not feel at liberty to decide."

ARGUMENT.

The issues in this case are both of fact and law, and in discussing them we will first ask attention to a consideration of the law of the case and then of the matters of fact.

Argument as to matters of law.

Tthird assignment of error.

Conceding for the sake of argument that both vessels were in fault in causing the collision (which of course we deny) both having been surrendered under the limited liability provisions of the Revised Statutes of the United States, can the principal and surety on the bond, given for the release of the Dumois and her pending freight, correctly, be permitted to deduct half the amounts they are decreed to pay Mrs. Hester and Mrs. Blesine from the amount decreed as half the damages sustained by Springer, owner of the Argo?

It is too well settled to require the citation of authority, that in a case of collision of vessels, and a proper surrender of the property in fault, the personal liability of the owner is confined to the property surrendered at the *end* of the voyage, and any recovery that may be had, to what ever may be realized from said property so surrendered.

The law in this country and in England on this subject is entirely different. There the owners liability is confined to the value of the property just before the disaster, here it is confined to the value of the property after the disaster. In the case of the Benefactor, 103 U. S., page 246, the court said:

"In England, the value of the vessel immediately before the collision was regarded as the true criterion of liability. But the English law is different from ours. It makes the owners liable to the extent of the value of the ship at the time of the injury even though the ship itself be lost or destroyed at the time; whereas our law follows the admiralty rule, limits the liability to the value of the ship and freight after injury occurred; so that if the ship is destroyed the liability is gone; and whether damaged or not damaged, the owners may surrender her in discharge of their liability."

In The City of Norwich 118 U. S. p. 490, the court said:

"We held in Norwich vs. Wright, and we have held and decided in many cases since, that the Act of Congress adopted the rule of the admiralty law as distinguished from that of the English law on this subject; that the value of the vessel and freight after, and not before the collision is to be taken."

And in the case of The City of Norwich 118 U. S., p. 468, and in The Great Western 118 U. S., p. 520, it was decided the owner, claiming the benefit of the limited liability law, need not surrender a policy of insurance upon the vessel surrendered, or moneys collected thereon; that the same did not enure to the benefit of parties who may have suffered by the disaster. And the reason is most apparent, 'viz., because the owner's liability is confined to the value of the wreck, after, and not before the collision, and as it lay sunk at the bottom of the sea or river. In the language of the court in said City of Norwich 118 U. S., p. 492:

"The proper value of the steamer was taken in the court below, namely, the value which she had when she

had sunk, and was lying on the bottom of the sea. This was the termination of the voyage."

Hence, if the vessel is a total loss and nothing is recovered from the wreck, there can be no recovery by those who have suffered by the disaster.

The application of this law to this case is this. There is no personal liability on the part of Springer, because he has surrendered the wreck of the Argo and all claim for freight; and there can be no recovery therefrom, because there was no freight due, and the vessel was a total loss from which nothing can be recovered. There is no personal liability on the part of Jakobsen, the owner of the Dumois, because he has surrendered her and her pending freight and given bond for the appraised value thereof, to-wit: $31,333.73, and costs, making a total of $32,500 (R. p. 18), and this is the only liability in the case. How then could the Court of Appeals, rightfully, decree that the Dumois, being condemned to pay full damages to Mrs. Hester and Mrs. Blesine from the above bond, decree that the principal and surety on said bond could deduct one-half of what they were condemned to pay said Mrs. Hester and Mrs. Blesine, from the amount they owed Springer? Certain it is, that Mrs. Hester and Mrs. Blesine could not recover the whole, or half, or any part of the damages they might have suffered, from Springer (even though the Argo might have been in fault), because he has surrendered the wreck and claim for freight, and because he was not obliged to surrender his suit for damages to secure the benefit of the limited liability provided by law, and for the reason that his suit for damages is a claim for the value of the Argo as she existed before the collision, and

not after she was sunk on the bottom of the river. Nor could Mrs. Hester or Mrs. Blesine recover anything from the wreck of the Argo, because it has no value. In fact there can be no recovery in this case by anyone, except from the bond given for the surrender of the Dumois. Yet under the decision of the lower court, Springer's property (one-half the value of the Argo, less half the damages sustained by the Dumois in the collision, and no part of which—as above stated—he was obliged to surrender, is taken from him to pay part of a debt which he does not owe because of said surrender, and which said bondsmen do owe. In other words, the damages sustained by the Dumois in this collision was $185.00, and if she and said Argo were both in fault, one-half of this amount is all the Argo (Springer) would owe the Dumois (Jakobsen), and the balance of the half of the damages sustained by the Argo are the property of her owner, Springer, half of which the decree wrongfully takes from him and hands over to the Dumois bondsmen to reimburse them in part, a debt which the Dumois alone owes.

It is true it was decided in the case of the North Star 106 U. S., p. 17, a case of collision where both vessels were in fault, and one was lost and her wreck was surrendered, that the owner of the lost vessel could only recover one-half of his damages, and the evident reason was, that, both being in fault the surviving vessel only owed half the damages. But that was a case solely between owners of colliding vessels, both in fault, and it has never been decided that the owner of one vessel can take from the owner of the other vessel one half of what the former has to pay to a third, innocent person, and

we apprehend it will never be so decided, and for the reason that the surrender of the sunken wreck on the bottom of the river, from which no realization can be made, absolutely put an end to all liability of the owner of the property surrendered. Surely the contrary would be destructive of the law that the liability of owners of vessels is confined to the value of the property surrendered at the end of the voyage.

We are also aware of the fact that it was decided in the collision case of The Washington and The Gregory, 9 Wall. — and in other cases since, that both vessels being in fault in causing damages to an innocent party, both were liable, and that the damages should be equally apportioned, with the right reserved to the libellant to collect the entire amount from either in case of inability of the other to respond, but that was not in any sense this case, and is no authority for the party who has paid full damages to recover back from the co-wrongdoer half the amount so paid, or to detain it out of what he may owe such party, and certainly is not an authority, when the debt so paid in full could not be collected in whole or in part from the first party. In that, and in the other cases where that case was followed there was no surrender of the offending vessel, and the doctrine of the limited liability provided by Congress was not invoked, discussed or passed upon.

Again. The decision of the Court of Appeals is in effect, that one wrong-doer can recover from his co-wrongdoer, one half of what he has been compelled to pay. This is not the law.

In Addison on Torts, (edition of 1891) p. 21, the law on this subject is stated as follows:

"No contribution can be claimed, as between joint wrong-doers. If therefore, a plaintiff, who has recovered a judgment against two defendants for a joint trespass, levies the whole damages on one of them, that one has no claim for a moiety of the damages from the other."

And surely, if he cannot recover it, he cannot detain it from what he owes, and especially not in this case, for the officer and the pilot of the Dumois are presumed to have known the law and that her movement to port with a starboard helm was in violation of the Act of Congress and the Regulations of the Board of Supervising Inspectors of Steam Vessels, and would in all probability produce a collision, if the pilot of the other vessel obeyed that law, as he did.

Another question of law in this case is, can the decree of the Circuit Court of Appeals, in the absence of any findings of fact and conclusions of law based on said facts, by the District Court, be sustained? In other words is there anything which the Cour of Appeals can review?

This question was discussed by Mr. Justice Brewer, presiding at the Circuit Court of Appeals for the Eighth Circuit, in the case of the Pioneer Fuel Co. vs. McBier et als., 84 Fed. Rep., p. 495, and we submit the point upon the discussion there had.

ARGUMENT AS TO MATTERS OF FACT.

Two questions will be here considered, to-wit: those that relate to the fault of the collision, and, second, those that relate to the value of the Argo.

First, who was at fault in causing said collision? In discussing this question it will be necessary to ascertain

where the vessels were in the river when they first came in sight of each other, what they respectively did to avoid coming together, and where they were in the river when they did collide. And in doing so, we will give the evidence on each side, and also notice what we think are errors in the opinion of the Court of Appeals.

At the outset it is proper to remark, that all of the witnesses when speaking of distances up and down the river, speak of them as they appeared in the night time, when the estimates, at best are mere guesses, and such guesses even when quickly made in broad day (and here they were quickly made in the night time) and without the assistanee of mile posts or other monuments, are of little value, and ever so much less when made in the night time. But these observations do not apply with equal force when witnesses are speaking of location (and not distances) between two known or given objects, where both such objects are in sight, and the point estimated, and from which the observation is made, is between two such known objects. For instance, a party might well be able to tell approximately, when on a vessel in the middle of the river, whether she was in the centre or not, because there are two objects—the banks of the river on each side—to guide and assist the judgment, while in looking ahead, the observer has no known objects to assist him, and as said before, any estimate of that kind is but a guess, and probably far from correct.

WHERE WERE THE VESSELS IN THE RIVER WHEN THEY FIRST CAME IN SIGHT OF EACH OTHER?

On the Argo, James Brown, her master and pilot, was on watch and at the wheel steering, and immediately alongside of him, and also on watch, at the time the Dumois lights were discovered, was his lookout, Desemus, while those on watch below were Orkney, the engineer; Broadhurst, the fireman, and Green, the cook, though not on watch was in the cabin and awake. Those not on watch and in their berths at the time of the collision and prior thereto, were Blesine, Hester, Lindauer and Cranz. The evidence of the above parties on the above point (except Hester and Blesine, who were drowned), and Cranz, who has not been called by either side, is as follows:

At page 48 Brown was asked and said as follows:

Q. Whereabout in the river were you when you first noticed the steamer which came in collision with you, where was your boat, in what part of the river? A. I was in the middle of the river.

Q. Were you going down stream? A. Yes, sir.

And at page 49 said:

Q. Over what bow of your vessel did you see? A. Over the port side of our bow.

Again at page 50, middle:

Q. In what part of the river were you when you first noticed him? A. In the middle of the river.

Q. Heading which way? A. Down stream.

And at page 53 he said:

Q. Well, how far away was the boat when you first saw her before you gave the signal? A. She was about three-fourths of a mile away. I guess about three-fourths of a mile the way I was going. I understand it now.

Yes, sir. I saw her some time before I blew the first whistle.

DESEMUS was asked, and said, at page 79, as follows:

Q. Where were you just before the collision occurred —on what part of your boat? A. I was with Captain Brown, standing by his side on the bridge that acted as the pilot house—it was above the pilot house.

Q. Did you pass any other boats before you came —before the collision occurred, a short time before? A. Yes, sir.

Q. What boats were they? A. I couldn't say the name, sir—there were some steamers, and I looked at the lights, one that I passed—there were some small craft with it.

Q. Where were they, on what part, what side of the river? A. On the east side, New Orleans side.

Q. Whereabout in the river were you when you passed these boats? A. I should judge in the center.

Q. What kind of a night was it? A. It was a clear night.

Q. Could you see the banks of the river without difficulty? A. You could see the trees, dark shade.

Q. When you passed this—you say you passed something on the left, east bank? A. Yes, sir; I thought it was the Day Dream or some of them small boats towing luggers.

Q. Did you give any signal to these boats? A. Yes, sir, I gave one—at least Captain Brown gave one to them.

Q. About that time did you notice any other lights anywhere, if so, where? A. Shortly after we passed the

last craft I saw the light, I was on the outlook, I saw a red and white light.

Q. You were on the outlook? A. Yes, sir.

Q. What bow of your boat did you see them over? A. I saw them on my left hand.

Q. Over your port bow? A. Yes, sir.

Q. Where was this red and white light that you saw in reference to the bank of the river—what bank was it on? A. On the New Orleans bank, on my port side.

Q. How far off was it when you first saw it? A. About three-fourths of a mile.

Q. Do you know whether Captain Brown saw it the same time that you did or about the same time? A. I think he did, because as soon as I saw them I said, Captain, there is a vessel coming; he said, yes; he waited a little while, I expected to hear the vessel blow, she didn't blow, so he blew one blast of his whistle.

The court says this witness was not on watch, or rather that Brown was the only man on watch at the time the vessels came in sight of each other (pp. 334 and 337), even conveying the idea that there was neither an engineer running the engines, or a fireman feeding the fires to make the steam to run them, but this is clearly wrong. Desemus was the deckhand on the Argo, and Brown was asked, and said, at page 49, as follows:

Q. Was any one on watch with you on deck? A. Yes, sir; the deckhand was right alongside.

And at page 57 said:

Q. Where was Deseamus? A. He was right alongside of me at the wheel; the wheel was abaft of the pilot house on deck; I was standing right up there.

Q. You had the wheel? A. Yes, sir; always.

Q. And Desemus was standing alongside of you? A. Yes, sir.

Q. How long had he been there? A. Off and on since we left; I kept him there in case I wanted to send him anywhere; he was lookout too. * * at page 66 said.

Q. At the time the collision occurred then, was there a full complement on watch in running the boat? A. Yes, sir; the lookout, and cook he was about; myself, engineer and fireman.

Q. Where was the lookout stationed? A. He was up on deck, on the upper deck along side of me. He was right up alongside of the wheel. (From which place he had the very best and an unobstucted view.)

And the above evidence, apart from being contradicted by no one is supported by Desemus himself, who after stating he was deck hand (p. 79) and telling how Captain Brown gave a signal to the Day Dream, was asked at page 80.

Q. About that time did you notice any other lights anywhere, and if so where? A. Shortly after we passed the last craft, I saw a light, I was on the lookout, I saw a red and white light.

Q. You were on the lookout? A. Yes, sir.

ORKNEY, the engineer's evidence on this subject, though not so direct is still clear, for just previous to the signal that preceded the colllsion he had come up from the engine room and looked out and saw lights of the tow (Day Dream) opposite the Argo on the opposite bank of the river. At page 69, middle, he states this matter as follows:

Q. When you came up, as you have stated, and looked out and saw the Day Dream, or the Day Dream's

tow? A. I saw a tow, I didn't know what vessel it was.

Q. How far were you from that tow with reference to the bank of the river—were you close into the side the Day Dream was, or on the opposite side, or in the midde? A. No, I guess we must have been in the middle, because we were so far away; I could make out it was a tow by the lights, but I didn't see the vessel at all.

Q. The night was clear? A. Yes, sir, it was a good night for seeing lights.

GREEN, the cook and steward, was asked and said, at page 100:

Q. Mr. Green, at the time you heard the cross signal and you looked out, could you tell in what part of the river the Argo was, whether she was in the middle of the river or whether she was near the eastern bank or near the western bank? A. She appeared to me to be in the middle of the stream, or might be, according to my idea, a little closer to the west bank than to the eastward. * * *

Q. You could see the banks? A. I could see either bank, I could see a long ways.

Q. Now after you got into the yawl boat and the Argo had sunk could you see the banks of the river then? A. Yes, sir; we were closer to the west bank than to the east bank (confirmed by the finding of the wreck 500 feet from the west bank), and we started for the west bank, it being the closest, to try to get there with the yawl boat.

This evidence the court also failed to heed or notice, and while it is true Green after hearing the cross signal of the Dumois and seeing her "apparently crossing the river" (Rec. p. 96) said he saw both signal lights when he

put his head out of the trunk, as he certainly could have done if she was there on a starboard helm, it is equally true he said the Argo was in the middle of the river, and had the Dumois not changed her course to show both signal lights to Green when he first looked out—his statement as to lights indicates that the Dumois was farther from the east bank than is claimed.

BROADHURST, the fireman, was in the fireroom and saw nothing until after the collision occurred.

Such is the evidence of those on board the Argo who made any observation on the position of the vessels prior to the collision.

On the Dumois it is claimed, that owing to the time for changing watches having arrived, and the ship having approached port, all four seamen and the carpenter were on deck (p. 264), one, Johnson, was on lookout, two were coiling up ropes on the forecastle, one, Larsen, took the wheel after the signals were crossed from Wessel (p. 302), yet only Larsen, who took the wheel from Wessel, the pilot, Lombard, and Sabitsin, the second mate, have been examined, and why the others, and especially Johnson, the lookout, and Wessel, the man at the wheel when the signals were crossed and the collision was imminent, and the carpenter have not been examined has not been satisfactorily explained.

It is true the master, Ruatad, at page 212, has tried to account for Johnson not being called, by saying he (Johnson) "wanted me to pay him to stay; he wanted me to bribe him to stay," but surely this is no excuse for not examining him de bene esse, if it is true he was about to go away, and prosecuting him if he swore falsely for perjury in the courts that are open as well to the

Norwegian as an American. But there is no excuse whatever for not calling Wessel, Neilsen, or the carpenter, all of whom could have thrown light on the facts of this case. Their not being called is a strong presumption that their evidence would not support the defense in this case, and would support the claim of the libellant.

LUMBARD, pilot of the Dumois, after stating she was 210 feet long (p. 239), that she was near the eastern bank a short distance below the New Canal—a quarter or a half mile—(p. 240) when he discovered the Argo's lights, was asked and said at page 241 as follows:

Q. What lights did you see at the canal, or near the canal? A. I saw a lot of bright lights—white lights.

Q. Did you see the side lights and white light of the Argo? A. I saw her red, green and white lights.

* * * * * *

Q. When you first discovered lights near the canal, what impression did it make on you? A. That she was one of the lugger boats, tugboats, making up a tow there.

Q. When did you become convinced that the vessel was descending? A. Not until after I had blown my two whistles and he answered me with one, when I was convinced she was coming down the river under way. * * * *

Q. Why did you blow two whistles? A. Well, because I wanted to let them know I was coming up and also thinking she was coming close along the bank I naturally gave her two whistles. I was out—

Q. How far were you from the east bank when you blew these two whistles? A. I should judge about a ship's length (210 feet).

Q. Where were those lights of the luggers at the new canal at the time? A. They were right at the canal, as near as I can judge.

Q. Did they appear to be dead ahead? A. After I hauled out they were a little inside, when I first sighted them, they were dead ahead.

Q. Why did you haul at that time? A. I hauled out to clear the luggers, and also the steamer that was there.

And at page 242 said:

Q. You say when you first discovered the lights of the Argo you were about a ship's length from the east bank of the Mississippi river? A. Yes, sir.

Q. State whether you saw all the lights of the Argo dead ahead or otherwise? A. They were dead ahead—if anything a little inside of us.

And at page 243 said:

Q. From seeing three lights on the Argo at the time you blew your two whistles, can you say where the Argo must have been or was in the river? A. She was close to the canal—close to the lugger landing.

Q. Close to which bank of the river? A. To the east bank of the river.

NICHOLAS SABITSIN, second mate of the Dumois, who claims he was on watch and on the bridge of the Dumois with Pilot Lumbard, places the Dumois double the distance (at one time 420, and another time 500 feet, p. 265) from the east bank, and the Argo dead ahead of her, when the vessels first came in sight of each other. He was asked and said at page 258 as follows:

Q. Where was the Dumois in the river at the time the lights of the Argo were first discovered? A. She was close to the east bank, very close. * * *

Q. How far was the Dumois from the Argo when you first saw her lights (p. 259)? A. I should judge about half a mile when we discovered it to be a steamer. * * *

Q. When you first saw the Argo's lights did you see all three at the same time? A. Yes, sir.

Q. State whether the Argo's lights were dead ahead when you first discovered them? A. Yes, sir, a little inside of us near the bank.

And at page 265, was asked and said:

Q. How close were you to the bank? A, I disremember, we were about a couple of ship's lengths from the bank.

Q. How long is the ship? A. About 200 feet.

Q. And this boat, this steamer's lights that you saw inside were closer to the bank than you were? A. Yes, sir. * * *

Q. Wasn't she, according to your notions, closer to the east bank than the luggers? A. No, sir, she was not—he was outside the luggers.

Q. The luggers had not made a landing in there yet, had they—they were turning in there to make a landing—they had not yet gotten to the bank? A. They got pretty close to the bank, closer than him—mostly in the bank.

And at page 274 was asked and said:

Q. You say you were coming up the east bank? * * * A. Yes, sir.

Q. Was it necessary for you to turn out into the

stream to pass the luggers? A No, sir, I don't think that was just the thing for him to be close to the bank.

Q. And the Argo was closer into the bank than the luggers? A. No, sir.

Q. How far? A. She was farther out than they, nearer on.

Q. Nearer to your line? A. Yes, sir.

Q. What lights did you see? A. I saw all her lights; she was heading right at us.

Q. Suppose two ships are approaching each other half a mile distant, and you see all the lights, side lights and masthead lights, doesn't that indicate to you that you are meeting head on? A. Yes, sir.

Q. Then you saw the Argo approaching you head on? A. Yes, sir, mostly. * * *

Q. Those lights you saw, all three? A. Yes, sir.

Q. That indicated to you that you were coming head and head? A. Yes, sir.

And at page 275, he was asked and said:

Q. And you were about 500 feet from the bank or 600? A. Five hundred, I should think. * * *

Q. They (the luggers) would be 50 feet? A. Fifty feet, the two of them. * * *

And at page 276, was asked and said:

If you were coming 500 feet from the bank, and there were luggers 50 feet wide, that would leave about 450 feet.

Q. Don't you know there was 450 feet? A. I said about.

Q. Your judgment was as you stood on the bridge and looked up the river and saw these luggers on the bank of the river as you came up, that there would have

been about 450 feet of space between your ship and the luggers as you went up stream, that is if you had kept your course, right up? A. Yes, sir.

LARASEN, a steersmen on the Dumois, whom the court pronounces "an able seaman" (334), but who said he did not know "that when one boat blows two signals and the other boat blows one signal that indicates that the boats are about to come together" and who in fact did not know what cross signals were, and yet was put at the wheel in this position of the vessels in the place of the man removed, was asked and said at page 297 as follows:

Q. How was the wheel of the Dumois at the time you relieved the other man? A. It was lying starboard.

Q. What was the course of the vessel at that time? A. We had no light in the binacle, we steered after the pilot's command and the vessel was swinging, turning, moving.

Q. Which way was she in relation to the banks of the river? A. She was swinging from the bank to port.

Q. From which bank of the river was the Dumois at this time, how far from it was she? A. It was the east bank I think they call it, I am not sure, it was the bank on the starboard side, about half a ship's length away.

Q. Did you see the lights on the approaching steamer? A. Yes, sir.

Q. When did you first see them? A. A minute or a minute and a half after I had taken the wheel.

Q. In what position was she approaching, was this approaching vessel at that time head on, or how was she

in what position did you have her when you first saw her? A. On the starboard.

Such is the evidence of those who were examined from the Dumois, and, in fact, all the evidence of the claimants on this point, except that of Nick Theodore, master of the tug Day Dream, (whose evidence will be noticed hereafter) who could not tell the width of the river anywhere and whose statements are so confusing and uncertain, that they would indicate the party was incompetent or demented, and are of no value in this discussion.

And if all of the foregoing evidence—that of both parties—stood alone it would be hard to determine whether or not the Argo was at said time in the middle of the river or near the eastern shore—210 or 500 feet from the bank—but fortunately for the Argo, the evidence of her crew is fully sustained by parties who were on board of the luggers, or on the towboat at the eastern bank of the river and saw the lights of both boats as the Argo came down and the Dumois came up the river, and who place the Argo in about the same position as her crew, to-wit: in the middle of the river.

JURISH, who was master of one of the luggers at the canal, which had previously broken lose and had been returned to the landing just prior to the vessels coming in sight, and whose lugger was lying on the outside of the Day Dream and from 40 to 50 feet from the bank, was asked and said, at page 91, viz.:

Q. Did you notice steamers coming down the river while you were there? A. Yes, sir; I saw the steamer coming down the river and he blew one whistle. I think

that was for the Day Dream and the Day Dream answered him with one.

Q. Where did he pass down—in what part of the river was he, could you tell? A. The boat coming down the river?

Q. Yes. A. I wouldn't swear, but I think he was coming right in the middle of the river, the same way any other steamer would come down. After a little while he blew another whistle again. He was a little more to the east, but like any other steamer, about in the middle of the river, a little more to the east, may be, a little more.

Q. Then you say he blew another whistle? A. Yes, sir. Then I looked down the river and I saw the steamer coming up the river on the east side of the Mississippi river. * * * And at page 92, he said:

Q. Was the big steamer crossing the river at the time the boats came together? A. Yes, sir, she was crossing the river.

Q. And the little boat was coming down the river about in the middle? A. Yes, sir.

Q. And the big steamer was crossing from the east to the west side? A. Yes, sir. * * *

Q. And the little steamer was coming down in the course—A. Yes, sir. And at page 93, said:

Q. The way steamers come down? A. Yes, sir.

Q. What I ask you is this—while the little steamer was coming down the river on her course, wasn't the big steamer crossing over the river in front of the little steamer? A. In front, yes, sir; sure.

The court says this witness "gives no satisfactory evidence as to where the Argo was when she first came

in sight of the Dumois," but this is clearly an error. It is true the witness speaks guardedly, for he was on the eastern bank and saw the vessels distant in front of him, and could not state the location of the Argo with exact precision, but he certainly places her far from the eastern bank, and "about in the middle of the river, a little to the east may be, a little more." But this is not all of his evidence on this subject, for he was recalled and had his attention called to a sketch made by him (copy of which is to be found on page 157) of the vessels at various times as they were seen by himself and Deedes (which he swears is correct), and their positions at such times are marked by him by the figures 1, 2, 3, 4, 5 and 6, of which he testified at pages 107 and 108, as follows:

Q. Now then coming down the river I see a mark of a boat marked No. 1. A. That is the steamship coming up on the right side of her.

Q. No. 2 what is that? A. That is the steamship when starting across the river.

Q. No. 3? A. That is were the collision took place, that is where they met one another.

Q. No. 3 are two boats? A. Yes, sir.

Q. No. 5? A. That is the Argo.

Q. That is the Argo? A. Yes, sir.

Q. No. 3; the upper one at No. 3 is the Argo also? A. Yes, sir.

Q. No. 6? A. That is the Argo when I first saw her coming down the river that is the time she blew her whistle for the Day Dream.

Q. But these are the positions of the boats in the river as you saw them? A. Yes, sir.

Q. Then you say the Argo was coming down in

what part of the river? A. She was coming like any other steamer or tug (which means in the accustomed course).

Q. What part of the river? A. In the middle of the river, but perhaps a little on the east side.

Q. Was she close to or far away from the bank on the east side? A. No, sir.

Q. She was far away? A. Far away, yes, sir.

If this is not direct and clear, and hence satisfactory, it would be hard to find evidence on any subject that is satisfactory.

DEEDES (p. 148), was pilot on the Day Dream, saw the Argo and heard her signal the Day Dream as she descended the river and passed the latter, and said latter's signal in reply, then the Argo's signal to the Dumois and the latter's cross signal in reply, which caused him to notice her and see her shooting across the river. This witness was examined as to the locality of the vessels when they came in sight of each other by reference to the above map or diagram on file marked "Libellant 3," and which was prepared under the direction of the preceding witness, and when shown this map the witness said (p. 150) it was pretty much correct, and with said map before him, at page 151, was asked and said:

Q. Here is No. 6 boat, what would you think—what would you think that to be, No. 6 boat coming down the river? Would you take that to be the Argo coming down? A. The only boat coming down was the Argo.

Q. Now, then, when you first saw her it blew one whistle? A. Yes, sir.

Q. Then afterwards the Day Dream answered that one whistle? A. Yes, sir.

Q. That would be when she would be about there and you down here? A. No, sir. Somewhere about where No. 5 is.

And this was when she whistled for the Dumois, and this places her where she is located by all the other witnesses for the libellant, in the middle of the river, and confirms the evidence of those on watch on board of the Argo.

And all the probabilities of the case point to Brown being where he says he at the time was, in the middle of the river. He was a skillful and experienced pilot of a great many years' standing—one who knew how many degrees there were in a point of the compass—his objective point was the jetties, which he was in great haste to reach, and not the east bank of the river at the New Canal, and he well understood that he was to reach that point as soon as the streamship Whitney, which had preceded her some hours. Under this condition of things, why should he be on the east bank instead of in the middle of the stream, where he would get the benefit of the current and make the best time and be facilitated in accomplishing the purpose of his trip? Not only the evidence, but all the probabilities are in favor of the Argo being where the libellants' witnesses place her; and this probability, even where there is a conflict, is not to be overcome except in case of a clear preponderance of evidence.

In the case of the City of New York 147, U. S., p. 79, the Court said: "Indeed, the probabilities that a steamer * * * will pursue the course customarily pursued in that vicinity by vessels bound from and to the home port, is so strong that deviation from that course

without apparent cause will not be considered as established without a clear preponderance of the testimony."

And that the middle of the river was the proper place under ordinary circumstances for a descending boat we will hereafter show.

We then have the evidence of Brown, Desemus, Orkney, Green, Jurish and Deedes on one side, supported by all the probabilities of the case, and further supported by the presumptions of the law, that when the vessels came in sight of each other the Argo was in the middle of the river, and demonstrated to be correct by the finding of the wreck of the Argo where she sank, 500 feet from the western shore (pp. 110 and 114), after the collision without moving to either the eastward or westward, and opposed to this is only the evidence of Lumbard, Sabitsen, Larsen and the ignorant and demented old Nicholas Theodore, who could neither read the statutes, pilot regulations, or figures and directions on the charts which should control him, and who in demonstration of his incompetency and ignorance of said statutes and regulations, and of the "starboard hand rule" or "rule of the road" which said regulations declared should be a "standing rule" for the government of pilots when vessels were meeting end on or nearly so, declared the Argo should have continued "right straight ahead" (p. 226) although he says he did not know whether she was going toward him at the bank of the river or down the river (p. 229), and that the Dumois in opposition to said "standing rule," and notwithstanding the signal for the contrary signal, which he said he heard from the Argo, should have pursued the

"port hand rule;" who testified the Argo was so close to him that he could see she was a white boat from his own chimney light, and although so near, and although he could not tell whether this white boat, which he thus saw, was going towards him or down stream, yet was "scared" she would sink his boat lashed to a tree on the bank and protected from such dire disaster by the lugger outside of him; who never heard the Dumois' whistles, never saw her until she was crossing the river with her white and green light in view, when some one called his attention to her, testified the pilot of said Dumois was "scared of the lights" (his lights) and "could not come on top of me" (him) "and sink me" (him) lashed to the bank with Captain Jurish's lugger on the outside of him, and all extending less than 50 feet from the bank; and yet the evidence of this "scared" old, ignorant, demented and pretended pilot, who did not know the width of the river on which he pretended to be a pilot, any where, not even at New Orleans, where he testifies it is a mile wide, while the fact is (as the chart, which he cannot read, and for which he says he has no use) shows is half a mile wide, the court refers to and adopts, saying at page 334:

"Nicholas Theodore, pilot on the tug Day Dream, which with its tow was about to land (had landed) at the lugger landing on the left bank just above where the collision took place, says that the Argo passed so close to him that he could see her color, that she was about 50 feet from him and he was afraid she would run into him."

And the intelligent, clear, direct evidence of Jurish, who was *not* "scared" of being sunk, although he was on his boat on the outside of the tug Day Dream, is re-

jected as unsatisfactory. Surely an attentive reading and analysis of the evidence of Theodore will show that it is worthless, biased and false, and of no value in determining anything in this case, and that the weight of evidence—that of said Brown, Desemus, Orkney, Green, Jurish and Deedes, six witnesses to three, with all the presumptions of law and fact in its favor, shows the Argo was at the time, where she claims to have been, to-wit, in the middle of the river.

Again. The river at this place is about 2,400 feet wide (see chart of Mississippi River Comm'r), and if the Argo was as close to the east bank as the Demois' witnesses put her, how does her wreck get within 500 feet of the opposite bank? There was not sufficient time from the moment the signals were crossed for her to have reached that point, unless the Argo was near the middle of the river, and in fact not sufficient time for the Dumois to have reached that point, farther to the westward than the Argo was (because the Argo struck the Dumois on her starboard side). The finding of this wreck is like the last fixed and certain point in a survey where all other points or corners are missing, but which can easily and certainly be found by running the back courses, and this, in this case would bring the Argo at the time in question where her witnesses put her, in the middle of the river.

But it is said in reply, how did the Dumois get from the eastern shore to within 500 feet of the western bank where it is claimed the collision took place? In reply we say there is no proof, nor is there any admission as to how near she was to the eastern shore. Larsen, the last man at the wheel, who took charge after the signals

were crossed and when the Dumois' wheel was hard astarboard, says she was half her length, 105 feet from the eastern bank. Lumbard says she was a ship's length, 210 feet; Sabitsen says she was 500 feet from said bank, and Theodore (*did not*, as the court finds) say the Argo was 50 feet from him or his boat, but on the contrary said "I could not tell how many feet it was away" (p. 225), and that she was more than 50 feet away (p. 229). And all that is said in the pleadings of Springer, is the indefinite assertion that the ascending steamer was "on the east bank" (p. 1), and in his answer found, on page 30, that there was fully 300 feet between the course the Dumois was then running and the luggers, all of which means the Dumois was toward the eastern bank, and, as the Argo's witnesses state, off the Argo's port bow.

But again it is said, suppose she was toward the eastern bank and not close against it, and to the eastward of the course of the Argo, being a much slower vessel, how could she get across the bow of the Argo? It is to be borne in mind that the Dumois was the ascending vessel, and when she swung her starboard side to the four mile current (see evidence of diver Conrad pp. 167 and 168) and diagonally across it, and thus received the very strong wind then blowing on her starboard beam, she had not only the force of her steam power propelling her, but the force of said strong current and wind greatly assisting her, and which would nearly double her speed, while the Argo being the descending boat running with the current would be impeded by the current in her starboard movement with a port helm, and would not be assisted by said wind, which would only strike her on her stern after her bow began to turn to the westward.

In fact we believe that when both vessels were thus crossing the river, the speed of the ascending vessel in crossing the river was far greater than that of the descending vessel, and this theory would get both vessels to the point where the collision occured (as evidenced by the finding of said wreck) within 500 feet of the western bank. If the Dumois was where she claims she was when the vessels came in sight of each other, and was only making 10 miles per hour in crossing the river, and was not greatly assisted by the strong current and wind on her starboard side while crossing diagonally across it, how did she within the time stated get to the place where she says the collision did occur, to-wit in the middle of the river? And if the vessels were "head and head" as is claimed, and the speed of the Dumois was not increased by the strong wind and current in crossing the river, and the Argo impeded by said current while crossing, the Argo being under ordinary circumstances the faster boat, and both vessels swung to the westward at the same time, how is it possible that the Dumois could have gotten farther to the westward than the Argo, where she certainly was, for the Argo struck her on her starboard bow? No other theory than the above would put the Dumois where she claims she was when the collision occurred.

Surely, the foregoing evidence, and especially the direct and positive evidence of Jurish, who has no interest whatever in the case, and who saw the Argo when she first whistled to the Day Dream and continuously thereafter until she sunk, and who says she was *far away* from said eastern shore where he was a spectator, cannot be wrong.

And that the wreck of the Argo does lie sunk (as above stated) 500 feet from the western shore, and never moved after the collision occurred, except perhaps floated down stream for four minutes until she went out of sight to the bottom, we will show under the head as to "where in the river the boats came in collision."

II.

WHAT DID THE RESPECTIVE VESSELS DO TO AVOID COMING TOGETHER?

Captain Brown's description of what he did begins at page 49, where he was asked and said as follows :

Q. A short time before you saw this boat (Dumois) did you see any other boat? A. Yes, sir, I passed the Day Dream; she was on the east shore; she was making a landing, I think—something of that kind. * * *

Q. Did you give any signal to her? A. I blew one signal to her and she answered by blowing one.

Q. When you passed her did you see any other vessel? A. Yes, sir, I saw the vessel.

And at page 49 said :

Q. What did you see, rather? A. I saw a bright and red light coming up on the east shore. * * *

Q. Over what bow of your vessel did you see? A. On the port side of our bow, forward. * * *

Q. Upon seeing it did you give any whistle? A. I blowed one whistle.

Q. Prior to your blowing one whistle had you received any whistle, had you received any whistle from the other boat? A. No, sir, not anything.

Q. After you blew one whistle, what then? A. It

was some time before she answered by blowing two blasts of her whistle—the ship coming up.

Q. What did you do then? A. I immediately afterwards, I blowed again. I repeated with one whistle again, and then put my helm hard a-port.

Q. When she blew two whistles was there any change in her course? A. Yes, sir, I could see she had starboarded her helm.

Q. What lights did you see then? A. I saw the green light coming out after she changed her course.

And at page 50 said:

Q. That indicated to you what? A. That he was going across my bow.

Q. He was going across your course? A. Yes, sir.

Q. After he blew two whistles? A. After that he never blew any more until he blew his alarm.

Q. After you blew your one whistle the second time did he reply with two whistles? A. No, sir.

Q. What did he do after you blew your one whistle the second time? A. About that time he was right on top of me—very near me; then he blew his alarm.

Q. Did they come together—did they come together shortly after that? A. About 15 seconds. * * *

Q. After the collision occurred what was done—how did they strike together, where did they strike? A. I struck the Dumois eight feet aft from her stem—eight feet.

Q. Did you examine the place afterwards? A. I saw it when she was at the dock. Then the vessel was going so fast it was half a mile before her headway was stopped, she went by me so fast. She was five or six seconds passing me. * * *

Q. By one blast of your whistle and the porting of your helm, what was the purpose of that? To which way did you want to go? A. I wanted to go to the westward, on the other side, out of his way; I was quartering. By the velocity I was going I was sure I could have passed him. We were going pretty near 20 miles an hour.

Q. Was the Argo a fast boat? A. Yes, sir, she was a very fast boat—a fast yacht. But he steered right across my bow. * * * (Page 51.)

Q. How far past you did she go before she stopped—you drifted astern? A. No, as soon as I got under her stern I told the engineer we would try and get to the west bank. We were going across; she was up the river nearly half a mile before she stopped, passed us.

DESEMUS, the lookout and deckhand, was asked and said, page 80:

Q. When you passed this, you say you passed something on the left bank—east bank? A. Yes, sir; I thought it was the Day Dream, or some of them small boats towing barges.

Q. Did you give any signal to these boats? A. Yes, sir, I gave one—at least Captain Brown gave one to them.

Q. About that time did you notice any other lights anywhere; if so, when? A. Shortly after we passed the last craft I saw a light. I was on the lookout. I saw a red and white light.

Q. You were on the lookout? A. Yes, sir.

Q. How far off from you was it when you first saw it? A. About three-quarters of a mile.

Q. Do you know whether Captain Brown saw it at

the same time that you did, or about the same time? A. I think he did, because as soon as I saw them I said, "Captain Brown, there is a vessel coming." He said, "Yes." He waited a little while. I expected to hear the vessel blow. She didn't blow, so he blew one blast of his whistle.

Q. What was the next thing that occurred? A. About 10 or 12 or 15 seconds after he blew we got an answer of two whistles. Captain Brown blew one immediately. We got no answer and Captain Brown headed her to Algier's bank, and this vessel took a change and came across the river.

Q. She left the east bank and came across the river to the west bank? A. Yes, sir, towards the west bank.

Q. When she came across did she make any change in her lights? A. Yes, sir, I saw the green light and the masthead light as well.

Q. Was the red light shut out? (p. 81) A. Yes, sir. I saw the green light all through the change when she was going across the river.

Q. As soon as the Dumois crossed the Argo's signal, and the red was shut out and the green light appeared, what did you do then. A. I left the bridge and started back aft.

Q. For what? A. To wake up the people. I thought there was going to be danger right then. I saw a ship crossing our signal and I ran aft.

Q. Did you call them? A. I didn't go all the way aft. I stopped right at the engine house door, about amidships.

Q. How long did you stop there? A. Maybe about two seconds. I just stood there and saw the ship, then

I ran aft right away. I don't think I was four seconds going from the bridge aft, and I hollered below for them to get up quick, there was danger. As soon as I hollered danger they struck. I didn't see her strike, but felt her strike, and fell towards the companionway aft the cabin and was knocked down. I got up on my feet quickly and hollered down she was sinking, to get up quickly, and then I left the deck of the cabin for the yawl boat. But the Dumois, she had gone way beyond us. * * *

Q. I want you to be sure who it was who blew the first signal ; was it the Argo or the Dumois? A. The Argo.

Q. And that was responded to by a cross signal of two blasts? A. From the Dumois—yes, sir.

Q. Then Captain Brown blew one signal? A. Yes, sir, immediately after the two were blown.

Q. Then what signals did she blow? A. I never heard any more at all until just about when I got amidships—well, before I got amidships, when I was running I heard a lot of hollering and a lot of whistles from the ship—danger signals I suppose they were blowing. * * *

ORKNEY, the engineer, at page 68, said:

I heard the whistles distinctly, both our own and others, and my attention was drawn to a cross signal given by this vessel we had a collision with. I did not know what vessel it was, but previous to that I had come up from the engine room and looked out, and I saw this tow passing, what looked like a tow passing, and I heard her whistle and saw her lights, and then I went below again and heard our captain blow the whistle which I supposed was for another steamer, and then I heard two whistles blow, which I thought was unusual, and I came

up to see what it was, and I could see the white and green light of the vessel (that is, after she had changed her course), which I knew was wrong. It should have been the white and red light. Then I hollered to our firemen, "We are gone." I could see then we never could recover ourselves. It was a very short time between the time they blew the signal and I saw this light, and I kept putting my head further up through the companionway. I was not out of the engine room a second—no time, hardly—when I saw the loom of the vessel going right up against our bow; then I saw the balance of her coming up out of the darkness. Immediately after that we struck her, and the concussion threw me down the engine room ladder, which was about four or five steps. With the shock the engine stopped, so I came on deck again, and I looked around, and they commenced to get the boat out, and then I went below again and looked around and saw her head pointing towards the bank. * * * (Page 69.)

Q. How soon was it after the collision that this steamship Dumois disappeared—the boat that collided with you—did she disappear immediately? A. Yes, sir.

Q. Was she stopped? A. She could not have been stopped at the rate of speed she was going, because when we got in the boat we couldn't see her. She had gone up the river.

Q. Did she disappear as if under way? A. I should judge she was under way, the way she was coming towards us.

Q. Was she coming slowly or rapidly? A. She was coming rapidly, because it was immediately after I saw the lights that she came right on us. (Which, of

course, was after she had changed her course, as above stated.)

Q. After she struck how long was it before she disappeared? (p. 70.) A. Not half a minute before she was gone, because we just crashed into and scraped along her sides. * * *

And said at page 74:

Q. Of the two boats, which blew the first signal, the Argo or the Dumois? A. The Argo blew the first signal.

Q. That was one blast? A. Yes, sir.

Q. What response was there to that? A. He blew two.

Q. And then the next blast? A. Then Captain Brown immediately blew one.

Q. Then what was next? A. The next was the danger signal from the Dumois, but they were all so close together there was very little time between them. * * * (Page 75.)

Q. When did you go on deck again? A. Not until I heard the whistle blow again.

Q. Not until you heard the signal from the Dumois? A. Yes, sir; not until I heard the cross signal; that was what brought me on deck.

Q. Then the Argo replied by another signal? A. The first signal she blew was answered by the Dumois with two, then the Argo blew one again.

Q. That was all the Argo blew? A. Yes, sir; then the Dumois blew the toot whistle—that is, the danger whistle; she loomed right up; she was no distance at all from us.

GREEN, the cook and steward, was asked and said, at page 96:

Q. Just prior to the collision did you hear any whistles? A. Yes, sir, I did.

Q. What whistles did you hear? A. The first whistle I heard was the Argo.

Q. What did she blow? A. She blew one blast of the steam whistle, to go to starboard.

Q. Was there any response to that? A. Yes, sir.

Q. What was the response? A. Two whistles.

Q. How soon did the response come after the Argo had blown the one whistle? A. It was inside of a minute.

Q. Well, then, were there any more whistles blown? A. Yes, sir.

Q. What were they? A. The Argo blew one blast again.

Q. Was there any response to that? A. Yes, sir.

Q. What was it? A. Two, then three short whistles on top of it, or four from the other vessel.

Q. Where were you precisely when these whistles were being given by the two boats? A. I was standing in the hatchway that led down in the dining room and kitchen (p. 10). There was a pair of steps that led all the way down, and I was on the top step with my head out of the trunk looking out *when the second whistle was blown*

Q. You understood there had been a cross signal? A. Yes, sir. I knew a cross signal had been blown, and I knew there was something the matter, and I was looking out for myself.

Q. You came, then, where you could see? A. Yes, sir.

Q. Well, what was it you saw? Just tell us in your own language? A. I saw there was a steamer coming

up the river, apparently crossing the river, and I saw that our boat was bearing right on the vessel, or that the vessel was bearing right on to ours, either one or the other. I furthermore saw—it looked to me, the way it loomed up, that a collision was inevitable. * * *

Again, at page 99, he was asked and said:

Q. After the collision occurred, after the Argo had struck the Dumois, what became of the Dumois? * * * A. As far as I know—I think she stopped her engines and drifted around there in the river after she lost her headway. I couldn't say whether she backed or went ahead; I wasn't on board of her to know—she went by there like a railroad train after we struck; it was not two seconds when we saw her back—we passed right under her stern counter.

Q. She wasn't stopped? A. I don't know whether she was going ahead or backing her propeller.

Q. But she was disappearing up the river? A. Yes, sir, at a great rate of speed.

BROADHURST, the fireman, was down in the fire room, where he heard the passing signal of the Argo, and came up after the collision had occurred, and saw as follows (p. 87):

We left Algiers on the evening of the 27th, and some time between 12 and 1 o'clock I heard the captain signal to pass a boat—he blew a single blast of the whistle, and shortly after he blew that one he blew another blast, and shortly after that the shock came. That is all I know about it—that is all I can tell (p. 88).

Q. After the shock did you come up? A. Yes, sir.

Q. Then what did you see? A. The first thing I saw—I looked forward and I saw the Dumois. I didn't

know it was the Dumois then—I saw a steamer across our bow—lying right square across it.

Q. Lying still or coming up the river? A. Coming across our bow up the river.

Q. Did she disappear rapidly? A. Yes, sir. I didn't have much time to look after her. She went out of sight. * * *

Q. When you got into the boat and pushed away from the Argo did she go down very soon after? A. Yes, sir. We hadn't got more than 100 feet before she went down. * * *

Q. At that time where was the Dumois? Could you see her? A. No, sir. We could hear her engines working, but could not see her.

Q. Was she up the river? A. Up and across.

Q. How far up was she? A. I should say half a mile.

Such is the evidence of those awake on the Argo, as to what the Argo did to avoid the collision, as well as what was done by the Dumois.

On the other hand, the evidence of those on the Dumois is directly to the oppose, and to the effect that the Dumois blew the first signal (two blasts of her whistle) and that the Argo crossed it with one blast of her whistle. The evidence of these witnesses on this subject is as follows:

LUMBARD was asked and said, at page 242:

Q. State, as near as you can, what took place from the time you first discovered the lights of the Argo? A. I blew two whistles and the Argo answered with one. I then blew again to let her know I had starboarded my helm, immediately followed up with the danger signal

and immediately stopped and backed. It was not—well, I couldn't exactly say what time it was when the Argo—came around on a port wheel—ran into our bow, our starboard bow, about 15 or 20 feet aft of the stem. She was still going ahead when she ran into and struck. Then she—we were backing—she drifted a little astern of us. * * *

Q. What interval was there between your first signal of the two blasts and the repetition of those signals? A. The second time I blew the two whistles?

Q. Yes. A. None at all—very little. I blew two and then gave them the danger signal after two (p. 243).

Q. That was hardly the question I asked you? A. I didn't understand you, Mr. Grant. I blew the two whistles first.

Q. And the Argo answered? A. With one.

Q. You repeated your whistle? A. Yes, sir.

Q. What interval was there between the repetition of those two whistles? A. It could not have been two seconds.

Q. You answered the cross signal immediately? A. Yes, sir, with two and the danger signal.

SIBITZIN, second mate of the Dumois, who says he was on watch and on the bridge with the pilot, was asked and said, page 259:

Q. Which vessel blew the first signal, and what signal did she blow? A. The Dumois blew the first signal.

Q. What signal did she blow? A. She blew two whistles, starboard helm.

Q. Was there any answer? A. There was an answer of one whistle after that.

Q. What did the Dumois do then? A. She blew two again, and then the danger signal right away. * * *

Q. Can you state of your own knowledge that you did not hear a signal from the Argo before you sounded your signal? A. No, sir, no signal from the Argo before we signaled.

Q. Did the Argo answer the danger signal? A. No, sir.

Q. How long was it after the two signals were first blown by the Dumois that the Argo changed her course? A. I couldn't very well judge—not so very long between, because she was going such a horrible speed and we were going along first rate. It must have been some couple minutes, something like that.

Q. What did you see after she changed her course? A. We saw her red light. She apparently changed her course. We were going out in the river all the time and she followed us up.

And at page 270 said:

Q. You have already said you stopped and backed your ship and lost your headway; you have further said that your ship was across the current. Now, how could the Argo drift faster down stream than you would, with both being water born? A. Because our ship did not stop as soon as the engines was stopped.

Q. Then you went on past the Argo after the collision? A. We were going a little ahead, yet.

Q. How far ahead of the Argo did you go before you stopped, four or five lengths that you have spoken of? A. I mean three or four lengths; I mean she was astern of us when she disappeared, that is what I mean.

Q. Then you had gone up stream away from her? A. I suppose so; she was not stopped.

LARASEN, one of the streersmen on the Dumois, was asked and said at page 296 as follows:

Q. Where were you when the collision took place between the Dumois and the Argo? A. At the wheel.

Q. How long had you been at the wheel? A. Three or four minutes.

Q. Did you hear any signals from an approching vessel while at the wheel? A. No, sir.

Q. Did you hear any signal given by the Dumois, and if so, when was that signal given? A. I heard it after I had taken the wheel and before I took the wheel.

Q. After the signals were given by the Dumois did you hear any signals in response? A. The first time I heard one blow from the other.

Q. What was the next signal you heard, either from the Dumois or the approaching vessel? A. Likely from the approaching vessel.

Q. What was the next signal you heard? A. It was two whistles from the Dumois.

Q. How many whistles did you hear in response to the first signal of the Dumois that you have testified to? A. Only one.

Q. After you heard this single whistle, what whistle was given? A. I heard two whistles from our boat.

Q. Did you hear any response? A. No, sir.

Q. What was the next signal you heard? A. I heard six or seven short blasts from our whistle.

Q. Did you hear a whistle from any approaching vessel before the Dumois gave her signal of two blasts which you have testified to? A. No, I did not. * * *

Q. Which way were you facing at the time the first signal was given by the Dumois? A. When the first signal was given I was not at the wheel. * * *

Q. Had you taken the wheel at the time you heard the response to the Dumois' first signal? A. No, sir.

Q. When did you take the wheel? A. Between the first and second signal.

Here again the evidence of those on the Argo as to what each vessel did before the collision is fully sustained by Pilot Deedes, of the Day Dream, and Captain Jurish, of one of the luggers, both of whom were at the shore opposite and witnessed the operations of both vessels.

DEEDES, after describing how the Day Dream landed luggers, when one of them got adrift, how the Day Dream went after her and secured and landed her, at page 148 said:

We made a landing first at the canal (opposite to which the collision occurred) with these luggers, and one of the luggers got adrift, then we went after her, about 12 o'clock we went after this lugger.

Q. Did you get hold of her? A. Yes, sir.

Q. What did you do with her? A. We came up with her and made a landing just below the canal.

Q. Was there any boat in the river that gave you a signal? A. We were about making a landing when the Argo blew one whistle.

Q. Did you make any reply? A. Yes, sir, we answered.

Q. With one whistle? A. Yes, sir.

Q. After that did she blow again? A. She blew one whistle again.

Q. What was the next thing? A. I heard another boat blow two whistles; it must have been the Dumois.

Q. Did you see where the Dumois was when she blew two whistles? A. She was just behind the Day Dream.

Q. On the east shore? A. Yes, sir, coming up, hugging the shore.

Q. Well, then, when the Dumois blew two whistles did she keep her course or did she change her course? A. When she blew two whistles that drew my attention and I went over to the other side of her (the Day Dream) and looked and saw the Dumois crossing the river and saw the green shooting across.

Q. After the Dumois blew two whistles did the Argo blow another whistle? A. Yes, sir, she blew another whistle.

Q. She blew one blast? A. Yes, sir.

Q. After that what did you hear, if anything? A. The Dumois blew her danger whistle—four whistles.

Q. Did anything occur after that? A. Then the Argo answered with the same danger signals. (Of course the latter is a mistake, as the Argo did not blow any danger signal, but in all other respects this evidence confirms that of the Argo.)

Again, at page 150, this witness said:

Q. After the Argo blew her whistle as you have described, the Dumois then blew one whistle and crossed the river? A. How crossed the river?

Q. The Dumois blew two whistles? A. Yes, sir.

Q. And went across the river? A. She went shooting across the river. I could see her green light.

And again, at page 151, said:

Q. You say you saw them after they separated? A. Yes, sir.

Q. How did they go then, did the Dumois go up the river? A. The Dumois stopped.

Q. The Dumois stopped, but she stopped after the collision occurred? A. I don't know when she stopped, but anyhow they both stopped; seemed to be 200 or 300 yards apart—seemed that way. * * *

Q. Was there any distance between the Argo and the Dumois? (Page 152.) A. I told you about 200 or 300 yards.

Q. Which was the farthest up the river? A. The Dumois.

Again, on cross-examination, at page 153:

Q. How long before the Argo came down did you succeed in getting her (the lugger) into the landing? A. We had just made the landing when the Argo blew one whistle—just made the landing.

Q. You were just tying up in there? A. Yes, sir, just making the landing.

Q. The Argo first blew when she was opposite you, didn't she? A. No, she blew before she got to us; she was far above us.

Q. How far up? A. It might be 50 yards—150, in fact—above us. * * * (Page 154.)

Q. When did the Argo whistle the second time? A. A short time after they blew one whistle again.

Q. And she passed you then? A. No, she had not passed us then.

Q. She first blew for the Day Dream 150 yards above you? A. Yes, sir.

Q. And when she got opposite you she blew another whistle again? A. Yes, sir; not quite opposite us yet. * * * (Page 155.)

Q. You have been asked how the pilot house was, etc.; but when you saw the Dumois coming up the bank, on the east bank as you have described, were you in the pilot house at that time? A. No, sir, I was on the main deck.

Q. On which side of the Day Dream were you, on the starboard side or the port side? A. When I heard the two whistles I went to the port side. I could not see from the port side.

Q. You went to the port side and looked down the river? A. Yes, sir.

Q. And it was then you saw the Dumois? A. Yes, sir, I saw the green light.

Q. You say when you heard the Argo whistle and saw her coming down the river, you were in front of the pilot house? A. I was on the starboard side.

Q. And then you looked up the river? A. No, sir, I was looking on the bank when I heard the whistle blow. I looked up. I was just making a landing and my attention was drawn to the whistle.

Q. After you heard the signal from the Dumois to the time the boats came together and then separated as you have described, was there anything to interfere with your seeing them? A. No, sir.

Q. You were standing on the port side looking at them? A. Yes, sir.

And at page 156 said:

Q. When was that, when did you see the green light on the Dumois? A. After she blew the two

whistles; after the Argo blew one whistle and I heard some other boat answer with two whistles, that made me go to the other side of the boat, and then I saw the green light on the boat coming up.

JURISH, who was at the river bank at the time, was asked and said at page 91 as follows:

Q. Were you inside or outside of the Day Dream? A. I was on the outside.

Q. How close were you to the shore? A. I was from the shore—about—the Day Dream was making a landing—I was from the shore—I don't like to make a mistake—about 50 feet, I guess, from the bank. I don t think—I guess 50 or 40 feet from the bank. * * *

Q. Did you notice any steamers coming down the river while you were there? A. Yes, sir, I saw the steamer coming down the river, and he blew one whistle, I think it was for the Day Dream, and the Day Dream answered him by one whistle.

Q. Then did he pass down—in what part of the river was he, could you tell? A. The boat coming down the river.

Q. Yes? A. I wouldn't swear, but I think he was com ng right in the middle of the river, the same as any other steamer would come down. After a little while he blew another whistle again. He was a little more to the east bank, but like any other steamer about in the middle of the river; a little more to the east, maybe—a little more.

Q. Then you say he blew another whistle? A. Yes, sir; then I looked down the river and I saw the steamer coming up in the river, on the east side of the

Mississippi river. I didn't hear any answer from the steamer.

Q. From the steamer going from the east shore? A. Yes, sir; then after a little while I heard four whistles that the steamer was blowing; then she was a good distance out in the river, you know; then I saw the little boat coming down blow four whistles; then after that I saw the little boat hit the big boat on the right side on his bow. * * *

And at page 92 said:

Q. Was the big steamer crossing the river at the time the two boats came together? A. Yes, sir, she was crossing the river.

Q. And the little steamer was coming down the river about the middle? A. Yes, sir.

Again, at page 93, said:

Q. What I ask you is this: While the little steamer was coming down the river on her course, wasn't the big steamer crossing over the river in front of the little steamer? A. In front, yes, sir, sure.

And these witnesses are confirmed by said Nick Theodore as to the whistles blown by the Argo. (Rec., pp. 228-9.)

It is therefore clear from the evidence of both sides that both vessels, after the signals were crossed, proceeded from the places where they respectively were in the river when they came in sight of each other toward the western shore; and it is equally clear from the weight of evidence (and the court finds it to be a fact) that the single blast of the Argo's whistle was the first blown to make the above manœuvre, and that it was given strictly in accordance with law we will show hereafter.

III.

THE NEXT INQUIRY IS, WHERE IN THE RIVER THE STEAMERS WERE WHEN THEY CAME TOGETHER?

CAPTAIN BROWN was asked and said on this subject as follows, at page 50:

Q. In what place in the river were you when the collision? A. We were a little to the westward of the middle.

After the loss of the Argo some movables from her floated and were found on the west shore, and concerning these this witness testified as follows (p. 54):

Q. There was some wreckage came ashore? A. Yes, sir, on the west side.

Q. What did it consist of? A. Stern sheets of the yacht that were aft on the quarter deck, they floated off and went on the west shore; a little raft.

Q. Was there anything in the shape of life preservers? A. Yes, sir, there were some of them further down; we didn't see them picked up; they were picked up by some of the natives.

How for below was that, where you saw it—was it below Lucas canal? A. It was two or three miles.

Q. On the opposite side of the river? A. Yes, sir, on the west shore.

Q. Would that indicate, in your judgment, anything as to where the collision occurred with reference to the river—whether in the middle of the river or on the east or west bank? A. It was certainly on the west bank, for that drift came in on the west shore; it was evidently there.

ORKNEY, the engineer, was asked and said, at page 69:

Q. When you came up, as you have stated, and looked out and saw the Day Dream, or the Day Dream tow—A. I saw a tow. I didn't know what vessel it was.

Q. How for were you from the tow, with reference to the bank of the river—were you close to the side the Day Dream was, or on opposite side, or about the middle? A. I guess we must have been in the middle, because we were so far away. I could make out it was a tow by the lights, but I couldn't see the vessel at all.

And after this witness had described the sinking of the Argo and how her crew had taken to the yawl, was asked, at page 70, and said:

Q. What was the next thing you did? A. We hollered to the vessel (Dumois.) We heard some voices aboard the vessel, although we couldn't see the vessel. I saw we were midway between the two shores and I proposed that we pull ashore; we didn't know which shore to go to, because one was as far as the other; then they commenced to holler on the steamer; she was backing down towards us.

DESEMUS was asked and said page 82:

Q. After you got into the yawl could you see the bank of the river? A. I could see the dark shade to the west bank—to the Algiers bank.

Q. Which bank were you closest to? A. To the Algiers band, the right bank going down, or west shore.

BROADHURST, the fireman, was asked and said, page 89:

Q. While you were in the yawl boat could you see the banks of the river on each side of it? A. I could see the bank of the river before we left the Argo; as

soon as my eyes got rid of the glare of the fire room I could see the banks.

Q. In which part of the river was the Argo then? A. About the center.

GREEN, the steward, was asked and said, at page 101, as follows:

Q. Now, after you got into the yawl boat and the Argo had sunk, could you see the banks of the river then? A. Yes, sir; we were closer to the west bank than to the east bank, and we started for the west bank, it being the closest, to try to get there in the yawl boat.

LINDAUER, one of the newspaper correspondents on the Argo, and who was saved, was asked, at page 159, and said:

Q. When you first came out of the cabin could you have any idea where the Argo was in the river? A. Yes; sir; the first thing I looked for was to see how far we were from the shore, thinking I might have to swim.

Q. What did you do then? A. I saw a woody shore—trees—I couldn't tell which side it was, whether it was the east or west bank, but as near as I could judge—well, between 200 and 250 feet, I should judge, from the shore, was where the Argo was, as near as I could judge.

And at page 162 this witness said:

Q. When you were in the small boat could you see the trees on the bank? A. Yes, sir; I could see the trees.

Q. Could you notice how close you were to those trees then? A. Not even then.

Q. Well, after you got on board the Dumois did you notice how close you were to the shore? A. Yes, sir.

Q. Which shore were you nearest to? A. The woody shore on the west bank of the river.

Q. Then you were nearer to that shore than you were to the east shore? A. Yes, sir; decidedly.

JURISH, who was on the east bank and who would have the least opportunity to judge exactly where the

collision occurred, was asked at page 92, and said as follows :

Q. About what part of the river were they when they came together? A. They were about, right a little below where I was.

Q. No, no, but I mean with reference to the bank —where they in the middle of the river, or near the east bank or near the —— A. They were in the middle of the river ; a little more, maybe, to the east side.

DEEDES, who was also a witness of the collision from the east shore, was asked, at page 151, and said as follows :

Q. Well, then, the point of the collision would be right opposite where the Day Dream lay on the shore? A. Yes, sir.

Q. A little westward of the middle of the river? A. Something like that ; in the middle of the river, or a little more to that side.

Q. A little more to the west side? A. Yes, sir.

The foregoing evidence as to the place in the river where the collision occured is somewhat at variance, but all is to the effect that it occurred between the middle of the river and its western shore ; but that Captain Brown, Green, Desemus and Lindauer are correct in their statements that the point of collision was well to the west of the middle of the river is settled beyond all dispute by the finding of the wreck of the Argo, by NORBERT BURAS, who, after stating how he found the same, describes its location, at page 110 of his evidence, where he was asked and stated as follows :

Q. How far below the canal is the place where this wreck lays ? A. It is about four arpents, more or less

Q. Four arpents, more or less, below the canal? A. Yes, sir.

Q. Near which bank of the river ? It is nearer the right bank going down, or the left bank? A. It is on the right bank going down.

Q. How far from the bank of the river is the wreck? A. About 500 feet, more or less, from the right bank.

Claimant, realizing the force of the above argued in the Court of Appeals, that the presence of said wreck 500 feet from the western shore was accounted for by the evidence of Orkney, the Argo's engineer (which it was contended, was to the effect that *immediately* after the collision the Argo's engines, which had been stopped by the collision, as well as her headway) were started, when she was heading toward that bank, and that this would carry her from the contended point of collision in the middle of the river where she sank, but there is no evidence to support this contention.

Orkney's evidence shows, that after the collision had taken place, after the Dumois had passed along the front of the bow of the Argo (which was knocked in, p. 242) and gone out of sight, and after the yawl of the Argo had been lowered into the water and while the crew were getting into it preparing to leave the Argo to save their lives, and when she was sinking rapidly, that it was noticed that her head was pointing to the west shore, when Captain Brown thought she might possibly be beached, that then Orkney rushed below just prior to the yawls shoving off, and started her engines, and then she was sinking so rapidly by her head that her crank shaft was turning in the water then in her hull, and when her stern was already lifted out of water, and her propeller was revolving in the air and as a consequence not moving the Argo at all. The accuracy of this statement, and the error on any contention to the contrary can best be demonstrated by giving the evidence of Orkney, as taken from his own lips by the stenographer as it appears on pages 75 to 77, as follows:

Q. The Argo struck the Dumois at right angles?
A. It looked like it.

Q. Did the shock stop the engines of the Argo?
A. Yes, sir.

Q. Did you go back and start the engines again?
A. Yes, sir, the second time.

Q. How long did her engines work after you struck?
A. The engines were working after we left the boat, her stern was out of water and her wheel was revolving.

Q. When did her stern come out first? A. When we were lowering the boat.

Q. How far were you from the Dumois? A. I couldn't see her then, she had gone.

Q. The Argo continued right down stream? A. We couldn't tell where she was going, she was pointed towards the bank when I went down to start her up the second time.

Q. She didn't stop from the time until you got off of her? A. No, sir, she was still going (not ahead as was contended, but) like a hog rooting (which is anything but going ahead).

Q. Can you tell how long it was from the time of the collision to the time you cast off the line of this boat with the men in it? A. I should judge it was about three minutes.

* * * * * * * * * * * *

Q. Mr. Orkney, have you already stated in this case that you started the engines of the Argo before you left her? A. Yes, sir.

Q. Please state when it was—at what time that you started the engines, and if you know, in which way the Argo was heading at the time you started them? A. It was shortly before I got into the boat.

Q. Had the boat already been launched? A. The boat was in the water, they were holding on to the painter, some were getting into the boat at the time I ran down and started her up.

Q. Then they were in the boat? A. Some were in the boat and some were on deck.

Q. They were on deck ready to get in? A. Yes, sir.

Q. And then it was that you started the engines? A. Yes, sir, after I passed the painter to the captain, the captain was in the boat and I passed the painter to him and went below and started the engines up.

Q. How did you happen to go and start them up? A. I saw her heading toward the shore and I thought, with the suggestion that the captain made, that we might

beach her and save her, but we didn't know at that time that she was so badly damaged.

Q. How long was it prior to your shoving off from the boat? A. We were in the boat three minutes from the time we hit, it must have been two minutes after we struck that I started her up again.

Q. It was just prior to your shoving off from her? A. Yes, sir, I went down and started her up, and when I started her I found that the crank was turning in the water and I saw then that the boat was going down very rapidly and we had just time to get away from her.

And this is fully supported by Lindauer at page 161 :

Q. How long did the Argo float after you got into the yawl boat? A. After I got into the yawl boat I don't think it could have floated over a minute or a minute and a half.

Q. You had only got away when she went down? A. Yes, sir, just barely got away from her. The way I noticed that the wheel of the Argo was turning, was that someone called out, look, you will go under her counter, and they took an oar and shoved the stern of the yawl boat from the stern of the Argo, just then the stern of the Argo lifted in the air.

* * * * * * * * * *

Q. At the time that you shoved off from the Argo, was the Argo making headway through the water at all or just floating? A. That even I don't know, I know her wheel was in motion.

Q. The wheel was under the water? A. When I first noticed her wheel, but after we got a distance away from her, say probably 15 or 20 feet I could see the wheel in the air and the revolution was so much faster than it had been under water I thought she was fighting the air.

And the evidence of the claimants themselves shows that after the collision the Argo never moved from the place where the collision occurred, except floating down stream. So say both Pilot Lumbard and Mate Sabitsin. At page 245 LUMBARD was asked by claimants' proctor and stated as follows :

Q. Which way did the Argo go after she struck the Dumois? A. She drifted very slowly along our side. About the time she got under our stern our headway was fully stopped and she was right there within a—well, a ship's length, I suppose, under our stern.

Q. Did she have any headway on, did you notice? A. When she sunk?

Q. Yes. A. No, sir.

Q. Do you know which way she was pointed? A. She was pointing a little to the west shore.

Q. Up stream? A. Yes, sir, up stream.

And SABITSIN, the mate, at pages 270 and 271, said:

Q. She went down just about where the collision occured in the river, only a little further down stream? A. She drifted below that.

Q. But she didn't go either to the east or the west bank? A. I couldn't tell.

Q. You saw her lights? A. Yes, sir, I saw her green lights.

Q. Did that green light that you saw, did it go after the collision, did it pass to the eastward or the westward, or remain in about the same place? A. As I saw it, it remained in about the same place.

It is therefore, clear from the evidence of both sides —in fact it is one of the things settled in this case (and settled notwithstanding the evidence of the master of the Dnmois in direct opposition to that of his mate and pilot, who on coming on deck as the collision occurred, said p. 211, "then I saw the yacht, she drove alongside of us and then went full speed to the west bank") that the Argo sank at a point in the river neither to the eastward or westward of where the collision occurred.

And this most important fact the court fails to notice or in any manner heed, as well as it does the further fact, that after the signals were crossed and when the danger was imminent the man steering the Dumois was suddenly taken from the wheel and the man Larsen, who did not know the meaning of a crossed signal, was put in his place.

And that the wreck as found by Buras is the wreck of the *Argo* is established by Captain Brown's identification of the parts of the same which Buras brought up with his grappling iron, and which are in evidence. See Brown's evidence taken May 24, 1897 (p. 114); also that of Springer, taken in open court on December 16, 1897 (p. 180).

This location of the wreck is not only confirmatory of the place where the collision took place, but it is also strongly confirmatory of the fact that the Argo was in the middle of the river when she first saw and first whistled to the Dumois with one blast of her whistle, for there was not sufficient time after her first signal was crossed and the Argo's second signal blown and her helm ported, for her to have gone far before the vessels struck, whereby the Argo's forward motion was entirely stopped, and from that time to the sinking she obtained no headway to the western bank.

Having established, as we believe, that when the vessels first came in sight of each other, the Argo was in the center of the stream descending, and that the Dumois was on the eastern shore about 400 or 500 feet from the bank (and the mate on watch says she was 500 feet), coming up the river and a mile or more distant from each other; and having further established, as we believe, that the Argo, after having first blown one blast of her whistle as a passing signal to the tug Day Dream landed at the eastern shore, and received an answer of one signal from said Day Dream, that immediately thereafter she blew a passing signal of one blast of her whistle to the steamship Dumois, and that she received from said Dumois a cross signal of two blasts of said Dumois' whistle and that thereupon said Argo replied with another single blast of her whistle and at once ported her helm to go to her starboard, while said Dumois, immediately after crossing the signal of said Argo, changed her course and shot across the river in front of the Argo and thereby caused the collision, we will undertake to show which vessel was in fault in causing said collision.

And as preliminary to this question we will show that the course pursued by the Argo in the middle of the river was under ordinary circumstances the proper course for a descending boat. So says Lumbard, the pilot of the Dumois, at page 244, where he was asked and said as follows:

Q. Which side of the river is it customary for the descending boat to take? A. They take the middle of the river.

Q. Why is that? A. Because there is more current there.

And at page 48 Captain Brown, of the Argo, was asked and said:

Q. Whereabouts were you in the river when you first noticed the steamer which came in collision with you —where was your boat, in what part of the river? A. I was in the middle of the river.

Q. You were going down stream? A. Yes, sir.

This he repeats at page 50, and on page 57 he says he was on his right course (the middle of the river), referring to the middle of the river.

And Captain Jurish, at page 91, says the boat coming down the river "was coming right in the middle of the river, the way other steamers would come down. He was a little more to the east, but like any other steamer about in the middle of the river; a little more to the east, maybe—a little more."

And there was no place for an ascending steamer to cross where this collision occurred, and especially not when the wind blows as it did that night. (Lumbard, p. 244.)

And there is no evidence to the contrary, and we therefore say that according to custom the Argo was in her proper place. The only suggestion to the contrary is to be found in the latter part of the third article of the Dumois answer to the libel, but in the amended petition praying the benefit of the limited liability acts of Congress filed by the claimant of the Dumois the middle of the stream is declared to be the proper place for a descending steamer, but we apprehend that notwithstanding the

above evidence, and the last judicial averment by the claimant on this subject he will again contend her proper place was on the west shore of the river. This contention is evidently based on the 25th article of act of August 19, 1890, to adopt regulations for preventing collisions at sea, as amended by the acts of May 28, 1894, and August 13, 1894, and June 19, 1896, and proclaimed by the President of the United States to take effect July, 1897, but this act has no application whatever, for the date of its taking effect was July 1, 1897, while the collision took place before that day, to-wit: on January 28, 1897.

Nor does the act of March 3, 1885, or any of its provisions destroy or interfere with the usual custom of the descending vessel taking her course in the middle of the river, or attempt to fix the proper position of the descending vessel, for it has no application to the facts of this case. Its last clause exempts its operation from the navigation "within the harbors, lakes and inland waters of the United States.

It is true it is contended there were no such laws relating "to the harbors, lakes and inland waters of the United States," but unfortunately, for that contention and the decision in the 44 U. S. Ap., 353, directly the opposite has been decided by the Supreme Court of the United States in the case of the Delaware, 161 U. S., p. 459, decided March 2, 1896. At page 463 the court says:

"The International Code for preventing collisions was first adopted by act of April 29, 1864, incorporated into the Revised Statutes as section 4233, and was made applicable generally to the 'vessels of the navy and of the merchant marine of the United States.' This code remained substantially unaffected by congressional legislation until March 3, 1885, when the Revised International Regulations for preventing collisions at see were adopted by act of Congress, and made applicable to 'the navigation of all public and private vessels of the United States upon the high seas and in all coast waters of the United States.' By section 2, all laws inconsistent with

these rules were repealed, except as to the navigation of such vessels within the harbors, lakes and inland waters, the original code of 1864 still remains in force, explained and supplemented by the rules of the Supervising Inspectors. The Act of 1885 did not attempt to draw the line between the high seas and the coast waters of the United States, on one hand, and the harbors and inland waters, on the other. Nor was it possible by any general rule of legislation to do so. We are of opinion, however, that the dredged entrance to a harbor is as much the inland waters of the United States within the meaning of this act as the harbor within the entrance, and that the real point aimed at by Congress was to allow the original code to remain in force so far as it applied to pilotage waters, or waters within which it is necessary for safe navigation to have a local pilot."

Again, at page 464, the court said:

"The recent legislation has not only established the proper practice for the future, but has explained what must have been the intention of Congress in passing the original act. By act of February 19, 1895, c. 102, 28 Stat., 672, to adopt special rules for navigation of harbors, rivers and inland waters of the United States, these waters are declared to be still subject to the provisions of Rev. Stat., Sec. 4233 (the original code) and to the regulation of the Supervising Inspectors."

This act will be more fully noticed hereafter, but the above is sufficient to show that the article in neither the act of 1885, or in that of 1890, with its supplements, has any application to this case as to the path of the descending vessel, but that the custom of the descending vessel pursuing the middle of the river is in full force in this case.

In further pursuing this question of fault, it will be necessary to determine, first, what lights each vessel should have carried; second, what are steering rules that should govern vessels in passing each other on the Mississippi river in the night time at the point in the river where this collision occurred; and, third, what signals said vessels should have given each other.

AS TO THE RULES OF NAVIGATION.

And here it is proper to note that the rules prescribed by the Board of Supervising Inspectors of Steam Vessels, to be found at page 82 of said rules (pamphlet of January, 1896), have no application to the facts of the collision in this case, which occurred 80 miles below the lower limits of the City of New Orleans, for it is perfectly clear from a mere inspection of Rule XIV of said rules, that said rules have no application whatever in the present case. Said rule declares:

"The line dividing jurisdiction between pilot rules on western rivers and harbors, rivers and inland waters at New Orleans shall be the lower limits of the city."

Nor do the Pilot Rules prescribed by said Board of the Atlantic and Pacific Coast Inland Waters control, for the preamble to said rules expressly declares the rivers flowing into the Gulf of Mexico are exempted from the operation thereof. See page 73, of said rules. And the last clause of Rule IX of the rules last named, still further emphasises the fact that the "Pilot Rules for Western Rivers" does not apply, for, it declares:

"The line dividing jurisdiction between pilot rules on western rivers and harbors, rivers and inland waters at New Orleans, shall be the lower limits of the city."

But it does not follow that the part of the Mississippi river from the lower limits of the City of New Orleans to the Gulf of Mexico, is exempt from the operation of any rules whatever, for this case had been provided for by Congress, by act approved February 19, 1895, the first section of which declares, in substance, that on and after March 1, 1895, the provisions of Sections 4233, 4412 and 4413, of the U. S. Revised Statutes and regulations pursuant thereto should be "followed on the harbors, rivers and inland waters of the United States," and the provisions of said sections, and regulations pursuant thereto, were thereby declared special rules duly made by local authority relative to the navigation of harbors, rivers and inland waters as provided for in

Article 30 of the Act of August 19, 1890, entitled, "An act to adopt regulations for preventing collisions at sea."

Under the second section of this act of February 19, 1895, the Secretary of the Treasury was directed to designate and define the lines dividing the high seas from rivers, harbors and inland waters:

"New Orleans harbor and the delta of the Mississippi river, South Pass East Jetty light N. ½ East to Pass a Loutee light, thence N. to Errol Island and from South Pass East Jetty light W. ⅞ S. to the Southwest light, thence N. to shore."

All above this line is "rivers, harbors and inland waters" up to the lower limits of the City of New Orleans.

And said Section 4233, which prescribes the rules which are to govern on said harbors, rivers and inland waters, is as follows:

"Sec. 4233. The following rules for preventing collisions on waters, shall be followed in navigating of vessels of the navy and in the merchant marine of the United States."

And herein, first as to

LIGHTS.

Rule 3. All ocean-going steamers, shall, when under way, carry:

(A.) At foremast head, a bright white light, visible on a dark clear night 5 miles, etc.

(B.) On the starboard side, a green light, visible on dark clear nights at least 2 miles, etc.

(C.) On the port side, a red right, visible on a clear night at least 2 miles, etc.

The green and red lights are to be fitted with inboard screens, projecting three feet forward from the lights so as to prevent them from being seen across the bow.

Rule 5. All steam vessels, other than ocean-going steamers, and steamers carrying sail, shall, when under way, carry the starboard and port side lights of the same

character and construction, and in the same place as are prescribed for side lights by Rule 3, except in case of Rule 6.

Said Rule 6 relates to river steamers (steamboats) navigating waters flowing into the Gulf of Mexico, etc., and provide for signal lights to be carried on the outside of each of the vessel's smokestaks, and by the following rule:

"Rule 7. All coasting steam vessels, other than ferryboats and vessels otherwise expressly provided for, navigating the bays, lakes, rivers or other inland waters of the United States, except those mentioned in Rule 6, shall carry the red and green lights as prescribed for ocean-going steamers; and, in addition thereto, a central range of two white lights, the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel. The head light shall be so constructed as to show a good light through twenty points of the compass, namely: from right ahead to two points abaft the beam on either side of the vessel; and the after light so as to show all around the horizon."

Such are the provisions of law as to the lights which a vessel of the kind of the Argo should carry, but it is the colored lights alone that are to control the pilots, and hence the importance of their construction and location, which is laid down at page 81, of said regulations, as follows:

"The manner of fixing the colored lights should be particularly attended to. They will require to be fitted each with a screen of wood or canvas, on the inboard side, and close to the light, in order to prevent both being seen at the same moment from any direction but that of right ahead (not 4 points, page 251, or 4 inches, on the surface of the compass, without telling how big the compas is, as Pilot Lumbard of the Dumois, page 252, would have us believe) to two points abaft the beam.

"This is important, for without the screens any plan of bow lights would be ineffectual as a means of indicating the direction of steering. This would be readily understood by reference to the preceding illustrations,

where it will appear evident in any situation in which two wessels may approach each other in the dark, the colored lights will instantly indicate to both the relative course of each; that is, each will know whether the other is approaching directly or crossing the bows either to the starboard or port.

"This intimation, with the signals by whistle, as provided, is all that is required to enable vessels to pass each other in the darkest night with almost equal safety as in broad day."

And herein as to the rules for:

STEERING AND SAILING SAID VESSELS,

which is Rule 18, and is as follows:

"Rule 18. If two vessels under steam are meeting end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

And herein as to the directions that are to control pilots as to the

SIGNALS OR WHISTLES TO BE GIVEN.

Among the "regulations pursuant" to the foregoing sections—and especially Section 4413 – of the Revised Statutes of the United States are those to be found on pages 78, 79, 80 and 81 of said regulations of "Supervising Inspectors of Steam Vessels" where various diagrams and illustrations with directions as to what shall be done in each case, including the whistles that are to be blown.

The first situation with diagram, is when the colored lights are visible to each, which indicates the approach head and head (and by note to be found at page 73, it is stated that "in the night steamers will be considered as meeting 'head and head' so long as both the colored lights are in view of the other").

"In this situation it is a standing rule that both shall put their helms to port and pass to the right, each having previously given one blast of the steam whistle."

This is the situation of the vessels in this case as detailed by the Dumois.

The second situation, with a diagram, is where the green light is visible on each steamer (which, according to the evidence of both sides, is not the present suit, at least not until after the signal had been given. They—the vessels—are, therefore, passing to starboard, which is rulable in this situation, each pilot having previously signified his intention by two blasts of the steam whistle.

The third situation, with diagram, is where the red light only will be visible (which is the situation described by libellant's witnesses) to the pilot of each steamer. Both vessels are evidently passing to port, which is rulable in this situation, each pilot having previously signified his intention by one blast of the steam whistle.

The fourth situation, with diagram, is where the steamers are approaching each other on oblique courses and the green light of the descending steamer would be visible to the ascending steamer, and the red light of the ascending steamer would be visible to the descending steamer. This is not the present case.

The fifth situation, with diagram, is where the green of the ascending boat is visible to the descending boat, and where the red light of the descending boat is visible to the ascending boat.

This is the situation in this case, *after* the Dumois swung out and attempted to pass in front of the Argo. This situation the regulation (pages 79 and 80) says requires great caution, and that the ascending boat should put her helm to port and pass astern of the descending boat, while the descending boat should continue her course, or port her helm if necessary to avoid collision.

It will be observed that in the first situation (the one claimed by the Dumois) and in the fourth and fifth, the language of the rules that are to govern the action of the pilot, is different from the other situations, and in this. In the first situation the rule is said to be a "standing" one—that is invariable, not to be departed from—and in the fourth and fifth situations the rule is that the vessel that has the other on her starboard bow "should put his

helm to port and pass astern" of the other, while the one that has the other on her port bow "should continue on her course or port his helm if necessary. In the other situations the action of the pilot there described is merely said to be "rulable," that is, permitted by the rule. In the one case the direction is peremptory, while in the other it is discretionary.

The substance of the rules is well summed up in the following ditty, which is well known to every experienced seaman:

> "When both side lights you see ahead
> Port your helm and show your red,
> Green to green, and red to red,
> Perfect safety, go ahead."

APPLICATION OF THE ABOVE RULES TO THE FACTS OF THIS CASE.

In the first place it is proper to observe that neither party was in fault as far as their lights were concerned. It is true that in the answer of the Dumois, as well as in the petition claiming the benefit of the Limited Liability Act, it is stated the head light of the Argo (called the masthead light) was too low, and only a few feet above the plane of the red and green lights, and hence was confusing, but there is no complaint that the lights were not burning brightly, that they were not seen at a long distance off, or that any one was mislead thereby, and even if there was, said lights were located strictly according to law. Captain Brown and his lookout saw the lights on the Dumois about three-fourths of a mile or more distant, while the mate of the Dumois, who was on the bridge with the pilot, as also the man at the wheel, saw the lights of the Argo half a mile or more distant. And certain it is that the Argo had such lights as the rules prescribe even though the court intimates the contrary (p. 337). Her inspection papers so declare. The only complaint is, that the masthead light (as it is called by the Dumois) was but a short distance above the signal lights, but under the rules, she was not required to carry

any masthead light at all. The confusion in the mind of the claimant of the Dumois (if there is any) is based upon a misunderstanding of the Argo and the rule governing her lights and the place where they should be carried. The Argo was not an ocean-going steamer, or a steamer carrying sail—such as is provided for in said Rule 2 of Section 4233 of the U. S. Rev. Stat., and was therefore not required to carry a masthead light, but was a steam vessel other than ocean-going and did not carry sail, but was provided for in Rule 5, and was required to carry the red and green side lights of Rule 2, and being licensed for the coasting trade, and permitted by her inspection papers to navigate "Lakes, bays, sounds and rivers," she came under Rule 7, and was required to carry the red and green lights prescribed for ocean-going steamers, and in addition thereto a central range of two lights; the after light being carried at an elevation of at least 15 feet above the light at the head of the vessel (not the masthead light), the head light to be so constructed as to show a good light through 20 points of the compass, from right ahead to two points abaft the beam on either side (the picture of the Argo shows this light with its screen), and the after light to show all around the horizon. The side lights and the after light are not complained of, but only the improperly called masthead light, which was on the forward part of the pilot house and was proper, and not in violation of any rule.

But the highness or the lowness of the head, or white light, on the Argo can in no sense be an excuse for the pilot of the Dumois in not seeing the Argo before he even did, nor for his conduct in crossing the river in front of the Argo, for it is the red and green lights alone that are to control vessels in passing each other, as the regulations hereinbefore given declare, and concerning which the Supreme Court of the United States, in BELDEN CHASE, 150 U. S., at page 693, said:

"The importance attributed to the red and green lights is apparent through these rules (of navigation), and in the rules and regulations of the board of supervising inspectors. After diagrams are given in illustra-

tion of the working of the system of such lights, it is here said that by reference to them it will appear evident that in any situation in which two vessels may approach each other in the dark, the colored lights will instantly indicate to both the relative course of each; that is, each will know whether the other is approaching directly or crossing the bows either to starbord or port.' This intimation, with the signals of the whistle, as provided, is all that is required to enable vessels to pass each other in the darkest night with almost equal safety as in broad day."

Even the absence of any light, if it does not cause or contribute to the collision, does not render such vessel liable for the collision. 3 Fed. Rep., 870; 9 Fed. Rep., 666. and the same is true of the absence of a lookout, 16 Wall., 334; 23 Wall, 69; 96 U. S., 600; 17 Wall., 243; 2 Wod.. 258.

And the same law applies to the statement of the court made after it had alread decided the case, "that it was hardly necessary to add that, at the time she was short of her regulation crew", for the evidence shows the only men short, were two deck hands, whose places were filled by Hester and Blesine, (both competent, pp. 169 and 170), and if said "deckhands" had been on board they would, at the time, have been below and asleep, pp. 65 and 66. There was nothing unusual, and certainly nothing wrong in having the representatives of the charterer become part of the crew, and there can, in this case, be no complaint of the fact, because it did not contribute to the collision, for the Dumois lights were seen by the lookout and master of the Argo (who under Sec. 4443 of the Rev. Stat. was also her pilot) three quarters of a mile distant.

The red and green lights of the Argo having been seen at least half a mile or more distant, what under the circumstances was the duty of the Dumois?

We think we have demonstrated that the Argo was in mid-stream and the Dumois toward the east shore of the river. In that event, it is plain under the rules that it was the duty of each vessel to sound one blast of their

whistle and pass to the right of each other, and hence the Dumois in attempting to pass on the opposite side was in grave fault and solely responsible for the collision.

But suppose that we have not shown when the boats first saw each other they were as above stated, and say that the evidence of the master at the wheel and his lookout on watch, that of his engineer and steward, and the evidence of Jurish and Deedes who witnessed the collision from the river bank, the finding of the wreck of the Argo, which never changed her position from east to west from the time the vessels struck until she sank to the bottom 500 feet from the west shore where it now lies, say all these facts are to count for nothing, the question then arises where were they? The mate of the Dumois says she was 500 feet from the eastern bank, while the evidence of those connected with the luggers shows they (the luggers) did not extend more than 40 or 50 feet from the eastern shore, to which they were tied, and this would leave 450 feet clear between the Dumois and the luggers, or more than twice the length of the Dumois, and more than ten times her width of beam. Now, the mate and pilot of the Dumois testify they saw both signal lights of the Argo (which the regulations say is "head and head"), and that she was dead ahead, or about dead ahead, and half a mile distant. What under the circumstances was it her duty to do?

Rule 18, above given, answers this in the following language:

"Rule 18. If two vessels under steam are meeting end on, or nearly end on, so as to involve the risk of collision, the helms of both shall be put to port" (the very thing which the pilot of the Argo did, while the pilot of the Dumois did the very opposite) "so that each may pass on the port side of the other."

And the diagram and illustration given by said Board of Inspectors of Steam Vessels will demonstrate what the result would have been had this rule not been violated by the Dumois. Who then was in fault, according to the location and position of the vessels as given by the Dumois? Captain Brown says he blew the signal

required under this rule, and so say his lookout, engineer and steward, and so say all the witnesses who were spectators of the collision on the shore—Deedes, Jurish, and even this old man Theodore. And this the court finds to have been the fact. The Argo, in all respects, observed this "standing rule," blew the whistle required thereby, and ported her helm as required, and was therefore not in fault.

It is true the pilot of the Dumois says there was but a ship's length between her and the eastern shore, and not sufficient room for him to pass the Argo on his left, but if that were true it would not justify his action in thrusting his ship across the course and bow of the Argo. But is it true? His mate, who knew the length of the ship better than the pilot, says there was 500 feet between her and the bank, and this evidence (and by an officer of the ship) we prefer to that of a man who pretends to be a skillful pilot, and who only knows a point on a compass, as an inch on its circumference, and cannot tell how many degrees there are in a point, and who says that vessels meeting each other would have to change their courses 4 points (45 degrees) in order that one of the signal lights might disappear.

It is also true that the witnesses from the Dumois swear they did not hear the Argo whistle before the Dumois blew her whistle, but if they did not, it was because they did not attend to their business, for not only was the signal given by the Argo, but immediately preceding it there was a like signal blown by the Argo to the tug Day Dream, and properly answered, and at a time when the latter was nearer the Dumois than when the Argo blew, and yet none of these whistles (which were certainly sounded, were heard on the Dumois, and if not why not? Simply, because the parties on the Dumois who should have heard them—the pilot and mate—on this cold and freezing night were under cover where they could not be heard. The parties who probably did hear them (the first man at the wheel—and strange to say there was a change of the man at the wheel after the collision became imminent—and the

lookout and an another sailor man on the bow of the Dumois at the time) have not been produced or examined by the Dumois. They were present and eye-witnesses to the whole affair, and, in fact, participants therein. Why have they not been produced and examined?

Nor can the Argo be found in fault for being, as the mate of the Dumois claims (and which we deny), 500 feet from the eastern bank, and especially with the wind blowing strongly from that bank, where she would find the most quiet water. The only law that controled her was said Rule 18 of Rev. Stat. of the U. S. (and not the Pilot Rules of the Western Waters), under which either wessel had the right to whistle first, whereby the one so doing became the preferred vessel, when, as said rule of the statute declares, "the helms of both shall be put to port so that each may pass on the port side of the other." If the Dumois, 500 feet from the eastern bank, had not seen the signal lights of the Argo as soon as she did and recognized her as an approaching steamer half mile distant, with plenty of time to port her helm and space within which to make the manœuvre, had kept her course—when no collision would have happened—the custom, under ordinary circumstances requiring the descending boat in the middle of the river might count for something in this case, but the Dumois not being deceived, and the Argo being seen in ample time for both vessels to make the manœuvre required by the statute the one vessel that thus glaringly and openly violates the law is solely in fault, no matter what the custom is. The law controls in this case and not the custom. In other words, the Argo's not being (if such is the fact) in the place in the river where the custom required, where she under ordinary circumstances should be, but being seen by the Dumois dead ahead, and in ample time, and the Argo having (as the evidence shows and as the court finds) given the first and proper signal and helm, the Dumois after seeing said Argo and giving an improper signal and helm, whereby the collision was occasioned, the Dumois alone is responsible, for the primary cause

of the collision was not the fact that the Argo was 500 feet from the eastern shore when recognized as a descending steamer, but the Dumois' open violation of a positive act of Congress, forbidding her to do the very thing she did do, and for which not even any custom would excuse her.

Nor can it be said the Argo was in fault because of the speed she was going. The river was about half a mile wide, the night was clear, there was no crowd of vessels, and the errand on which she was proceeding was quasi public in its nature, to-wit: to carry newspaper reporters to meet a Congressional Committee to the jetties, who had already preceded the Argo on the steamship Whitney, and whom it was necessary to overtake to secure their proceedings and report the same for the public press.

But apart from the nature of her errand and the necessity for the speed with which she was proceeding there was no restraint by law or otherwise upon her rate of speed, because, as before stated, the night was clear, there was no crowd of vessels, and the water space was ample.

The only circumstances under which a steam vessel is required to slacken her speed, or stop, or back, is when she is approaching another vessel and there is risk of a collision, or where there is a fog. This is stated by the Rule 21 as follows :

"Rule 21. Every vessel approaching another vessel, so as to involve the risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at moderate speed."

But apart from its provision in reference to fog, this rule contemplates the case of a steam vessel approaching another vessel on their regular courses and not the case of one vessel suddenly throwing herself across the pathway or course of another vessel. In other words it is a direction to a vessel approaching another vessel where the courses are converging, and does not contemplate vessels approaching each other on parallel courses, for here there is no "risk of collision" involved. This is

shown by the fourth and fifth illustrations and diagrams on pages 79 and 80 of said regulations.

The fallacy of the contrary will appear by taking the case of two carriages approaching each other from opposite directien on the same highway. Each is in its proper place for passing and each is going rapidly, when suddenly the one shoots across the road right in front of the other approaching from the opposite direction and a collision occurs. Surely no sane person would contend that the latter was in fault for not slackening its speed or stopping, or backing, before the collision occurred, and especially when there was nothing to indicate that such an insane move would be made before it actually was made. The rule will be best illustrated by reference to carriages approaching on converging highways, when it will be the duty to slacken, and perhaps to stop and back, because here there is risk of collision.

This matter has been frequently passed upon in this country and in England, and many of the cases are collected by Circuit Judge Emmons in the case of The Free State, 1 Brown's Admiralty Rep., 251, and among those given are the following:

"The Rob Roy ran down the Unicorn, going at full "speed until she was in such close proximity that the "attempt to stop was useless. The green light of the "Unicorn being extinguished, and the red light hid on account of her course, she was mistaken for a small craft. The Rob Roy ported, as she should have done had the "vessel been what the light indicated. Dr. Lushington "excused the Rob Roy for not slowing speed, becanse he "says the lights which the Unicorn displayed indicated it "was safe to do so."

In this case it is further shown that all of the rules above referred to are but declaratory of what the law was before said rules were adopted, and at page 262 said:

"The law, before the statute, was that declared by it; and therefore the rule as to slowing would be the same under the one as the other. Ought she to have slackened her speed sooner than she did? Whether the light she saw was on a steamer or on a sailing vessel,

no duty to slacken speed or to change the course of the Scotia arose until there was reason to apprehend a collision. The suggestion that it was her immediate duty to slacken speed when she saw the light, assumes what at first instance is not to be assumed. If she saw the light and observed it diligently, without having reasonable ground for apprehending a collision, no duty to slacken speed, or even change her course, was created."

And the judge further observes:

"It was not intended to change the rule of the road so far as any duty in this case was concerned, by the adoption of these articles. The regulations they establish are as old as steam and modern improvements in navigation."

And still further said:

"That the so-called 'Golden Rule' of porting and passing to the right was established before the Act of 1864; see St. John v. Paine, 10 How., 583; the Nimrod, 15 Jurist, 1201; Story on Bailm, 611; The Duke of Sussex, 1 Wm. Rob., 274; The Rose lays down the rule stringently, 1 Pars. Adm., 569, and note 4; and fully affirming the rule, see New York Co. v. Navigation Co., 22, How., 461, citing some of the leading English and American judgments. The Supreme Court says the rule is well established."

And at page 264, at the bottom, the court further said:

"A very large majority of all the decisions in reference to collisions, both English and American, assumed as well settled this principle, that actual perceived danger alone demands the duty of slacking speed."

This case of The Free State went to the United States Supreme Court, where the decision of the Circuit Court was affirmed and the above doctrine reiterated in the 91 U. S. R.. p. 200, where that court said at p. 206:

"If two steamers are meeting each other end on or nearly so where there is plenty of sea room, and at considerable distance from each other, it is not the duty of either to stop, reverse, or to slacken. The duty of each is to pass on the port side, and the rate of speed is not an

element in the case. The risk of collision is not present under such circumstances."

Rule 18, as to steam vessels meeting end on or nearly so, so as to involve risk of collision, is the same as Rule 16, as to sailing vessels meeting end on or nearly so, and the decisions in this country and in England are numerous, that when the vessel not observing this rule is condemned without regard to the one porting, not having stopped before the collision occurred. Two English cases are given by the court in The Free State, 1 Brown's Admiralty, page 265, as follows:

"The Cognac (Holt's Rule of the Road, 133). Two vessels approached end on. The one followed the rule and ported, but the other suddenly starboarded, and brought about the collision. Dr. Lushington pronounced against the offending ship, although the other was proceeding under full steam; no criticism whatever was made upon the rate of speed.

"The Concordia (Holt, 142). So far as this question is concerned, the facts are substantially the same as those in the Cognac. For a faulty starboard movement, the Concordia was condemned for the whole damage, although the other vessel was proceeding with rapidity up to the moment of the collision."

On this subject of a faulty starboarding of the helm, see also The Maggie J. Smith 123 U. S. R., p. 353, and the cases of the United States Supreme Court there summarized as follows: The Nichols, 7 Wall., 656; The Dexter, 23 Wall, p. 69, and the Annie Lindsly, 104 U. S., p. 185. In the case of the Maggie J. Smith, at page 355, the court said:

"Nor is there anything in the position that, when two vessels are approaching in opposite directions so as to involve risk of collision, and one of them violates the rule of navigation in directing its helm, and the other vessel sees it, she will be in fault if she does not also turn her helm so as to avoid the consequence of such departure from the rule."

Again, take the positions of the vessels after they had changed their courses—that is after the Argo ported

and gone to starboard, and the Dumois had starboarded and gone to port across the path of the Argo, what was then the duty of the Argo and what that of the Dumois? The regulations and illustrations of the Board of Supervising Inspectors, at pages 79 and 80 answer, that it was the duty of the Dumois to put her helm to port (not to starboard as she did) and pass astern of the Argo (directly the contrary of what she did do) while it was the duty of the Argo to continue on her course or port her helm if necessary to avoid the collision, both of which she did do.

It is therefore clear Captain Brown, in all respects, observed Rule 18 of Sec. 4233 of the Revised Statutes when he blew one blast of his whistle and ported his helm to pass to his starboard, and that Lumbard, the pilot of the Dumois, violated this law when he blew two whistles, starboarded his helm and put his vessel across the path of the Argo, and before she can excuse herself she must show that this breach of the law did not and could not have caused the collision. This was directly declared in Belden vs. Chase, 150 U. S. R., p. 699, as follows:

"And while under Rule 24, in construing and obeying the rules, due regard must be had to all dangers of navigation and to any special circumstances which must exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger, the burden of proof lies on the party alleging that he was justified in such departure. The Agra, L. R. 1 C., 501; The General Lee, Irish L. R. 3 Eq., 155. Indeed, in the Agra, it was ruled that not only must it be shown that the departure at the time it took place was necessary in order to avoid immediate danger, but also that the course adopted was reasonably calculated to avoid that danger. *And it is the established rule in this court that when a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so.* The Pennsylvania, 19 Wall., 126, 136; Richelieu Navigation Co. vs. Boston Insurance Co., 136 U. S., 408, 422."

See also The Britannia, 155 U. S., page 143, where the above doctrine is declared and the latter part of the above paragraph is quoted in full. See also The Victory vs. The Plymothian, 168 U. S., p. 428.

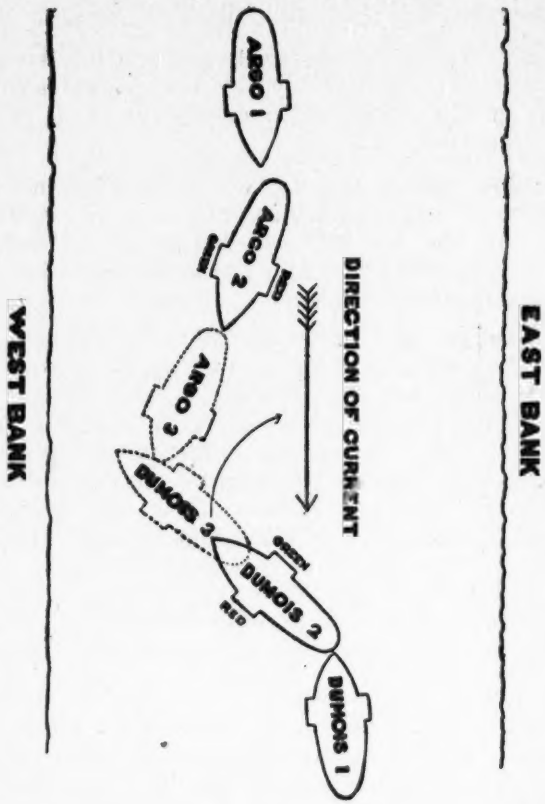
Rule 24, above referred to and which is invoked in this case, was discussed by the United States Supreme Court in The Maggie Hammond, 123 U. S., page 349, where the court said :

"The rule applies only where there is some special cause rendering a departure necessary to avoid immediate collision, such as the shallowness of water, or a concealed rock, the approach of a third vessel, or something of that kind."

None of these things prevail here, for the enlarged chart shows from 26 to 45 feet of water right up to the eastern shore, and the evidence shows the Day Dream and the lugger alongside of her only occupied from 40 to 50 feet, which would leave plenty of room for the Dumois to pass to the westward of the Day Dream and its lugger. Certain it is, that under no circumstances was it necessary for her at any time to have shot out in the river to the middle thereof where she says the collision took place, to pass said luggers and Day Dream, even if these latter, tied to the shore, are to be considered as "the approach of a third vessel," which we deny.

Even if, according to the theory of the Dumois, it was necessary for her to swing out in the river to pass the Day Dream and luggers, she then had the Argo on her own starboard bow and then it became her duty to keep out of the way of the Argo, and to do so, she should have ported her helm, and gone to the starboard at least after she was far enough out to clear said Day Dream and luggers, while the Argo should have con-

tinued her course as she did, and no collision would have been possible, as the following diagram will show:



The court quotes extracts from the evidence of Captain Brown to show he was in fault in not stopping his vessel and reversing, but—we think—it fails to appreciate, certainly to note—what we also think—is a very satisfactory reason for doing so. After stating that not 15 seconds elapsed from the time the signals were crossed by the Dumois (p. 63)—which was the beginning of the danger—to the time the vessels came together,

and that the Argo's speed could not be perceptably checked in that time, and in stead of stopping and backing, at p. 64 further said: "I thought when he rang the alarm and reversed that he would stop the headway of his ship and get me clear of him, the velocity I was going, him 10 miles an hour and me going 20 miles an hour. * * * And at page 65 said:

Q. When he crossed your signal, and you blew the single blast and put your helm hard aport, if you had undertaken—could you then, owing to the closeness which the vessels were together, could you have stopped and avoided a collision? A. No, sir, it was impossible.

Q. What was your judgment when you blew your whistle the second time and put your helm hard aport, as to what was best that could be done under the circumstances? A. That was to go ahead.

Q. Then I understand you to say, that, considering all the circumstances, the closeness of the vessels together, that it was your judgment, then and there, that the best for both to have done was for you to go ahead and throw your vessel to the starboard, put your wheel aport and throw it (vessel) to the starboard? A. Yes, sir, my judgment called for that in a tight place like that.

And yet the court says, "the master of the Argo (without telling why) believing in the speed of his vessel, and that he could run around and pass to the right of the Dumois in any event kept his course until he struck the Dumois and sunk his vessel." And that the master was justified in his belief, that the Argo (after the crossing of the signals by the Dumois,) could not have stopped and thereby avoided the collision, is also shown by the evidence of Orkney, the engineer, who, at page 73, said, the Argo would run half a mile after steam was shut off, and that, even if shut off and the engine had been reversed, there was not time, after the Dumois blew two signals crossing the signal of the Argo, for the Argo (which he says was making 200 turns per minute and 18 miles per hour) to have avoided the collision by stopping and backing.

And, as we have hereinbefore shown, after the Dumois crossed the signal and headed to cross course of the Argo, under said Rule 19 of Sec. 4233 U. S. and the regulations and illustrations of the Board of Supervising Inspectors, it was the duty of the Dumois to port "her helm and pass astern of the Argo, *while the Argo should continue on its course or port its helm*," but not to stop and back. This is the very opposite of what the court says was the Argo's duty to do.

One of the latest decisions in a collision case is that in the New York Connemaugh case, decided by the United States Circuit Court of Appeals, for the Sixth Circuit, and reported in the 82 Fed. Rep., p. 819. This collision occurred in the Detroit river, a short distance below the City of Detroit, and at a point where the river (according to the chart) was a little over half a mile wide, and resembles the collision in this case, and especially in the situation and relation of the colliding vessels just before the collision, when Rule 19 of said Sec. 4233 was applied. It gave the New York the character of the preferred steamer, and it does the same for the Argo, and more especially after the Dumois starboarded her helm, because the rule declares the vessel having the other on her own starboard must keep out of the way of the other, the very opposite of which the Dumois did.

In the New York case both vessels were on a port helm just before the collision, the Connemaugh following the tow. The latter signaled three different times for permission to pass to the starboard instead of the port side, and without receiving the consent or a reply of any kind, starboarded her helm and ran across the bows of the New York. Counsel contended that the New York, if she did not give consent to a starboard helm on the part of the Connemaugh, the signals of two blasts of the whistle, repeated by the Connemaugh three times, should have been answered by one blast of the New York's whistle; but the court holds the Connemaugh had no right to starboard under the circumstances, and that this was not a case where "silence gives consent," and that the New York was not obliged to give such signal.

The vessels were on parallel courses, says the court, and would have passed each other safely had the Connemaugh held her course, which the New York had a right to expect she would do. It was contended the Connemaugh was in danger of running into the tow of the Burlington (intervening between the two vessels) by holding her course, and that a starboard helm was necessary, and that under said Rule 24 she had a right to depart from rules and starboard her helm; but this claim was not allowed, although the Connemaugh was very close following upon the tow which she was seeking to avoid. The tow, then, in the New York case, represents the part counsel for the defense in this case seeks to make the luggers play. It is not disputed that the luggers were made fast to the shore. The Dumois claimed when she blew her signal of two blasts, which the Argo answered with one, that she wanted to go to port, but the Argo's one blast was notice to her that she did not have said Argo's consent and a declaration that the Argo would hold her course.

The Dumois claimed when she first sighted the Argo the vessels were half a mile apart, and hence the Dumois was half a mile from the luggers when she starboarded her helm. This, then, was the danger, and the only danger set up in justification for violating the rules to prevent collisions. We can see some excuse for the starboard helm of the New York with the Connemaugh running close in the wake of a tow, for naturally the master would want to get out of such a position; yet the court decided he had no right to starboard his helm without the consent of the New York.

There was a very good reason why the New York should not be required to consent to the change of course on the part of the Connemaugh. The parallel courses —both vessels having the other's red light—did not involve any risk of collision. The change the Connemaugh asked to make would endanger the New York, and she was not required to place herself in danger to take another out. The Connemaugh changed her course without the consent of the New York, and of the two

evils took what must have appeared to her was the least, and in doing so ran across the bows of the New York and was lost To uphold the Connemaugh in this case would be equal to saying, to get out of the danger of hurting A you can take a desperate chance of injuring B, and B, not knowing of your intention, must sufler if he does not keep out of the way, notwithstanding B is doing nothing wrong and is going ahead about his business in a lawful way. This is not the law. Rule 24 authorizes a departure from the previous rules of the collision act to avoid immediate danger, but it does not justify injuring someone else to save yourself, and then have the innocent stand the damage.

But when the position of the luggers in the Argo case is considered as playing the part of the tow in the New York case, the proposition is absurd. The Dumois had lots of room—she was not within half a mile of the luggers when she sighted the Argo and starboarded her helm. The luggers were tied to the bank and the Dumois had an abundance of room and water to pass without changing her course at all. It is very certain it was not necessary to cross the middle of the river and the course of the Argo to avoid the luggers, as the court would have to find to excuse the Dumois for her starboard helm. There was a space of at least 1,150 feet between the course of the Argo and the luggers, and with no obstruction in the way there was no necessity for crossing the bows of the Argo, and Captain Brown could not be expected to anticipate such an insane move on the part of the Dumois. Even after the Dumois had starboarded her helm, Brown had a right to expect the Dumois would not violate Rule 19, and to believe the Dumois would go astern of the Argo. On the whole, it would be hard to find a case more favorable to the Argo than the New York case, and that case holds the New York free from blame when she did just what the Argo did, to-wit, held her course and did not stop or attempt to stop. The Connemaugh had the New York on her starboard side, just as the Dumois had the Argo, after the former had starboarded and the latter had ported,

and the court holds it was the duty of the Connemaugh to keep out of the way, and the New York could not and was not bound to anticipate she would not do so. She had no right to try to cross the bows of the New York and might have gone astern of the tow, and the New York could not be held at fault for not stopping.

Again. A slight recalling of the facts as disclosed by the evidence on both sides will show how unfounded is the pretense of the Dumois that it was necessary to starboard her helm and run out into the river in order to prevent running into the luggers tied at the bank. According to the evidence of both sides the collision occurred below the place where the luggers were at the bank, and according to the evidence of the Argo she was to the westward of the course of the Dumois, and according to the evidence of the Dumois the Argo was dead ahead—both her signal lights being in view. Now, according to the evidence of either, the Argo having passed the luggers before the collision occurred, why was it necessary for the Dumois to starboard to pass the luggers, which the Argo had already passed?

And equally unfounded is the assertion that the Argo, because of her speed, was a dangerous craft, and hence a menace to commerce. Such an argument would absolutely prohibit any improvement in the speed of vessels and would render the modern steam vessel an impossibility.

Equally unfounded is the statement that the "Argo was not constructed so that her speed could be checked when required by the rules of navigation, or that she could be backed within any reasonable time after sighting danger." All there is in the case on this point is what is stated in the pleadings, to-wit, that her backing power was slight (but there is neither allegation nor proof of any kind that she could not stop and back as alleged), but this means that her backing power was slight as compared with her power or ability to speed ahead, and this is true of all fast steamers. They are made to steam ahead. The shap of the hull, and especially that of the bow as compared with that of the stern,

the construction of the propellers—speed wheels—and in fact the entire construction of the vessels indicate this. Like the Campagnia, the Lucania, the Teutonic, the Majestic, the St. Louis, the St. Paul, and still later the wonderful William the Great, which sustained the wonderful speed of 22.35 knots for an entire passage across the ocean. Surely no sane person would for a moment contend these were dangerous and unfit to pursue their business because they did not possess the same facility to run 22 knots backward, as forward. It is true of every fast vessel that her ability to go backward is slight compared with her ability to go forward. One of the best proofs of what is here stated is the fact that the Dumois, whose forward speed, it is said, was only from nine to ten knots per hour when under full steam, was unable to stop her forward motion against a strong current, even after it is said her engines were reversed full speed astern, and continued her forward course way beyond the Argo, going up the river entirely out of sight, according to the evidence of her first officers three or four lengths, and according to the evidence of the Argo half a mile before she was stopped. But even the comparative slight backing power of the Argo under no circumstances would justify the Dumois in suddenly wrongfully and illegally thrusting herself across the bows of the Argo.

And the facts of the case show the Argo was not running as fast as her master imagined, nor "recklessly" as the court observed, for the night was clear and there was plenty of water and no crowd of vessels. She left New Orleans on the evening of January 27, 1897, at 7 p. m., and had hastened all the way. The collision occurred a few minutes past 12 o'clock, and the point of collision, as shown by defendant's pleadings, was 85 miles below the city, while the map shows it was less than 80 miles, and this would give her speed at 16 miles per hour, or the speed her builders—Herreshoffs—say she was capable of making, and this would be in these times ordinary speed for any steam craft unless it was a scow or a tub.

It is therefore clear that neither Rule 21, as to slacking speed or backing, nor Rule 24, in reference to varying from the general rule in special cases, have any application to the facts of this case, for there was no danger of collision when the Argo blew her first whistle, because at that time, as we have shown, the Dumois was to the Argo's left, as was disclosed by her red light, and according to the evidence of the Dumois the Argo was dead ahead, as was disclosed by seeing both of her signal lights, when under Rule 18 and the diagrams and illustrations on page 78, it was her duty to port her helm —just as the Argo did—and pass on the port side of the Argo, where there was no possible chance of a collision, and because there were no special circumstances in this case requiring such a departure.

The only possible risk of collision was when the Dumois crossed the Argo's signal and wrongfully threw herself across the course of said Argo—a thing which Captain Brown says (at page 58) no sane man would attempt to do, and which, after 40 years' experience on the river, he has never known anyone to attempt to do, when it was her duty not to have put her helm to star board as she did, but to have put it to port and passed to the left of the Argo. And if it is said she had to swing out from the eastern shore to pass the luggers, which we again deny (for the mate of the Dumois says she was 500 feet from the bank, and the luggers occupied from 40 to 50 feet, leaving 450 feet clear, and there was deep water right to the bank), then it was clearly her duty to have stopped and backed without changing her course, and not to have attempted to cross or swing out at all until the Argo had passed. (The Atlas, 10 Black ford, 459.) In any event her forward motion with a star-board helm was radically wrong, and at this point of time, when the Dumois did throw herself across the course of the Argo, she was so close to the Argo that the latter could neither slacken her speed or stop before the vessels would come together. This is apparent from the evidence of both parties. Steam might have been shut off, it is true, and the engine started backwards,

but, as the engineer of the Argo shows, even when this is done she would go forward for a long distance before her forward motion would be stopped, just as the Dumois did when she was reversed full steam backward.

Under these circumstances and at this instant of time, Captain Brown's judgment was that he might, by putting his helm hard to port and continuing his speed, pass in front of the Dumois, avoid the collision and prevent being cut in two, which he thought might occur if he tried to stop. In this, it is true, he was mistaken. But this judgment was forced upon him by a condition of things brought about by the Dumois. In other words, he was put in *extremis* by the conduct of the Dumois, and for any damage which might result from such judgment the Argo is not responsible, for the proximate cause of the collision was the conduct of the Dumois, and the mistaken judgment formed by Captain Brown while in *extremis* by reason of the wrongful conduct of the Dumois.

This principle has often been decided. In the Elizabeth Jones, the Supreme Court, quoting from an English case (Bywell Castle, 4 P. D., 249), said:

"When one ship has, by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame if she does something wrong and has not been maneuvered with perfect skill."

See also the Maggie J. Smith, 123 U. S., p. 349. The Nacoohee, 137 U. S., p. 340. The Blue Jacket, 144 U. S., p. 391.

There can be no doubt of the fault of the Dumois in crossing the course of the Argo. This was in direct violation of Rule 18 of said Sec. 4233, and in direct violation of the "standing rule" on page 78 of the rules and regulations prescribed by the Board of Supervising Inspectors of Steam Vessels, of January, 1896, even if the Argo was dead ahead, "meeting end on," for the Dumois, according to the evidence of her mate on watch, was 500 feet from the eastern shore and there was ample room for each vessel to pass on the port side of the other, and the contrary move on the part of the Dumois is alone

sufficient to account for the collision. In this situation the language of the Supreme Court in the case of the Oregon, 158 U. S., at the bottom of page 197, is of great importance in this case:

"Where one vessel is clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter which can only be rebutted by clear proof of a contributing fault."

As a result of the foregoing we think we have shown that from the time vessels came in sight of each other to the time of the collision the Argo was at no time in fault, and the Dumois, during all of said time, was in fault in everything she did, that is:

First. The Argo being the descending boat in the middle of the river, and the Dumois being the ascending vessel toward the eastern shore, said Argo was not in fault in blowing the passing signal of one blast of her whistle, and said Dumois was in gross fault in crossing the signal of the Argo with two blasts of her signal. See "Third Situation" and diagram on page 79 of said Pilot Rules.

Second. If the Argo was not in the middle of the river, but nearer the eastern shore, still she was not in fault in blowing a passing signal of one blast, to pass to the right, because both of her signal lights were visible to the Dumois ("head and head"—see said Regulations, p. 72), while the latter was 500 feet from said shore, giving ample room for the vessels to pass on the port side of each other, and the Dumois was in gross fault in crossing the signals of the Argo, starboarding her helm and crossing the Argo's course, and in doing so violated "a standing rule" of the Supervising Inspectors of Steam Vessels (a rule that has the force of a statutory enactment—Belden vs. Chose, 150 U. S., 698). See "First Situation" and diagram, page 78 of said rules.

Third. That the Argo was not in fault when she again blew her signal of one blast, still insisting in going to the right, and porting her helm accordingly.

Fourth. The Argo was not in fault under the circumstances in not slacking her speed, stopping or backing, not being in the sense of the law the approaching vessel, and not having, after she was cros-signaled by the Dumois, sufficient time to do either, because, as shown in the "Fifth Situation," it was not the duty of the Argo to slacken speed, stop or back, but to continue her course, as she did.

Fifth. If in the latter respect it should in any manner be claimed the Argo was in fault (which we deny), then she was put in extremis by the wrongful and sudden change of course by the Dumois in thrusting herself in front of the Argo, and for any want of proper maneuver on the part of the Argo (if such there was, which we also deny) the Argo is not responsible.

THE NEXT PRINCIPAL QUESTION IS, WHAT WAS THE VALUE OF THE ARGO, AND WHAT DAMAGE HAS THE LIBELLANT SUFFERED?

The petitioner complains of the decree of the Court of Appeals in as to said valuation.

First. Because the decree of the lower court is for too small an amount, and under the evidence should have been for at least $20,000 with interest from the date of the loss, to-wit, January 28, 1897.

Second. That in no event should the amount awarded libellant by said decree have been for less than $15,000 (on the basis of which one-half interest in said Argo was sold to be delivered the day after her loss), with interest from said date of loss on January 28, 1897.

In examining the facts on the question of damage and loss it is prosper to bear in mind the law on this subject, which, briefly stated, is as follows: It is not what A or B would have given for the Argo, or what she would have sold for at forced sale, but what was her value in open market? The law on this subject has been stated in collision cases as follows: In the case of the Colorado, 1 Brown's Ad. Rept's, the court said:

"The vessel being a total loss, the value just before the collision is the measure of damages. The difficulty is to ascertain that value. The criterion is, what would she have brought in the market, not under the hammer at forced sale, but in the ordinary course of sales of such property? (Londes on Collision, 141 to 146; 1 Parsons on Shipping and Ad., 452.)"

In "The Atlas," 93 U. S., 310, the United States Supreme Court said:

"Satisfaction to the libellant for the injury sustained is the true rule of damages in a cause of collision, by which is meant that the measure of compensation shall be equal to the amount of injury received, and that the same shall be calculated for the actual loss occasioned by the collision, upon the principle that the sufferer is entitled to complete indemnification for his loss, without any deduction for new materials used in making repairs, as is prescribed in the law of marine insurance. Complete recompense for the injury is required."

The appearance, character, style and condition of the Argo are fully disclosed by her picture, her papers, and the evidence of the witnesses to be found in the record, from which it well appears she was slightly over 95 feet long, 15 feet beam, with 6 feet of hold, and when built in 1878 was called the Leila, with name afterwards changed to that of the Argo; and that, though built in 1878, she was subsequently rebuilt, received a new boiler, which as late as January, 1897, stood a hydrostatic pressure of 186 pounds and was allowed a working steam pressure of 124 pounds to the square inch, and in 1893 received a new hull, deck and other matters at a cost of $10,000 (Babcock, p. 140), making her in all respect a better boat than she was when originally built, and at the time of her loss, "from keelson to truck" was in first-class condition, and her outfit, furnishings, etc., were of the very finest, while her speed when pushed was 21 miles an hour.

What was the market value of such a craft, in such a condition and of such speed? What would be "complete compensation for the injury which the libellant has

sustained in her total loss? Certainly nothing less than $20,000, with interest from the date of said loss, and in no event not less than $15,000, for which one-half was sold, for which the money was to have been paid the day after her loss, had she not been lost by the sole fault of the claimant.

And first we will refer to the evidence of the claimant on this subject.

Captain Woodward was the first witness examined, and while it is true he says he made an examination of the Argo with the view of ascertaining her value, it is apparent from his evidence that such examination must have been quite superficial, for he says she was a high-pressure boat, and that to go to sea she would have to have the addition of a condenser (p. 287), whereas her official papers show she had a compound condensing engine (p. 175), and Orkney, her engineer, says she had a compound keel condenser (p. 68). And, strange as it may appear, Captain Woodward further said speed of 21 miles an hour would not be an element of her value (p. 287), while to a yachtman speed is the principal element of value and the great item in the cost of construction.

With such an imperfect knowledge of the vessel, Captain Woodward says he thought she might have sold for $8,500 (not that this was her value), and that he would not have offered more; but says frankly that that amount does not fix the value of the boat, but that he would not have offered more (p. 280) (evidently with a view of buying her and again selling at a profit); but when his attention was called to the fact that she had been sold for $15,000, to be delivered the day following that on which she was lost, he says that sum would fix her value (p. 281).

The evidence of the Hereshoffs (p. 306), the original builders of the Leila (which was afterwards called the Argo), has also been taken, and it declares the original cost of the Lelia was $18,000, and to duplicate her would cost $20,000, and that if she had been kept in good repair one-third of the last amount should be deducted,

which would fix her value at their place in Bristol, R. I. (but not in New Orleans, and it would cost a large amount to bring her here) at $13,334. But the building of a new hull, strapped and braced with iron braces and supports beyond what she was when built, with a new deck, made her, in fact, a new boat, and as the witnesses who were conversant with this construction say, made her a better boat than when she was new.

The evidence on the subject of value is as follows:

W. I. Babcock, manager of the Chicago Ship Building Co., and of large experience in the building and repairing of vessels, says she was worth $17,500 (p. 140).

David M. Cochrane, a steamboat man of large experience, who carefully examined the Argo in Chicago in 1895, in the fall, places her value at the time of her loss at $18,000 to $20,000 (p. 143), and says that to duplicate her anew would cost from $26,000 to $30,000. Not to duplicate her as she was when originally built, but as she was in 1895, when, owing to having received a new hull and other things, she was a "better boat than when built."

Frank Huettman, of Detroit, who was the builder of yacht engines and machinery for steam yachts, and who had done all the work on her while she was in Detroit, and who was on her in Galveston, Texas, in 1896, for 10 days and took apart her machinery, put in a new truss bearing and did other work on her, and thereafter replaced all her machinery and made three or four trips on her, finding her in first-class condition, says that on January 28, 1897, her market value would be from $25,000 to $30,000 (p. 122).

Timothy E. Tarsney, of Detroit, an attorney at law and a proctor in admiralty, but prior thereto for seven years a practical marine engineer on the western lakes, on January 28, 1897, puts her value at $18,000 (p. 125), and on cross-examination said:

"I base my opinion as to the value of the Argo when she was lost in January, 1897, upon my knowledge of the construction and equipment of steam vessels, a practical experience as a marine engineer for seven

years, a practical experience in machine shops and in the operation of stationary engines, and my experience as proctor in admiralty, and knowledge generally acquired from persons familiar with steam vessels, and more particularly from personal observation and inspection of the yacht Argo, as stated in my answer to the third direct interrogatory; and about three weeks ago a client of mine sold her steam yacht "Azalia" for a consideration of $18,000. I was consulted concerning the sale. In my judgment the value of the Argo exceed that of the Azalia (p. 127)."

William Howie Muir, of Detroit, a manufacturer, has had no experience in buying, selling or building yachts, was acquainted with the Argo when she was called the Leila, and before she was rebuilt at Chicago at a cost of over $6,000 (p. 146), and knows she was sold for $9,000 or $7,000 to the Chicago people at a sacrifice because the parties who held her had no use for her; but he never saw her thereafter and can put no value on her at the time she was lost (p. 128).

Safford S. Delano, of Detroit, treasurer of a car company, has had no experience in buying, selling or building yachts, but knows the Leila was bought in 1884 for $10,644.03, and was sold in 1892 for $7,000—a price far less than her value—because the concern which owned her was going out of business and was willing to sell her at a great sacrifice rather than be bothered with her; but these sales were all made prior to the rebuilding of the Argo at an expense of $10,000 (p. 140), after which the witness says he is incompetent to put any value on her at the time she was lost (p. 131).

Thomas E. Miller, president of Miller Bros.' Dry Dock Company, Chicago, Ill., helped to rebuild the Argo in 1893. The company's bill for carpenter work alone was $5,746.32 He did not remember what the "other work cost," done at that time and consisting of "a great deal of machinery, boiler and blacksmith work was done at same time. Plates were put under the decking to strengthen her sides, and other work was done." (Record, pp. 145-6.) But Mr. Babcock says

Miller Bros.' bill was about $10,000, and by this he means, undoubtedly, the total cost of rebuilding which was done at Miller Bros.' dry dock, for he O. K.'d the bills (Record, p. 142). Mr. Miller places the value of the Argo at $20,000 to $25,000 (Record, p. 146).

Edward H. Gillman, of Detroit (p. 135) has had much experience in buying and selling steam yachts and steam vessels, and knew the Leila before she was sold to the Chicago people, and when she was running from Detroit to Grosse Pointe, for whom he made a careful examination of her at the time of their purchase, when said Chicago people paid $7,000 or $9,000 for her, and at which time he says she was positively worth from $12,000 to $15,000. This, of course, was before she had been rebuilt by said Chicago people at the above expense of $10,000, after which this witness never saw her, and hence can put no estimate on her value at the time of her loss; but says if she was in as good condition—and she was in far better condition after receiving a new hull, deck, and other repairs—as she was when she was sold as the Leila to Chicago, she was worth from $12,000 to $15,000, and that a vessel of her class could not be built for less than from $30,000 to $35,000.

Captain A. Thomas, of New Orleans (p. 188), who is familiar with boats, who has been a dry dock man, a pilot and captain, and who has built boats and owned vessels, carefully examined the Argo a few days before she was lost, and found her in first class condition in every respect, and considered her worth from $25,000 to $30,000.

In addition to all of the above, the evidence of Bagley (pp. 185-6) and Springer (p. 184) shows that the latter had concluded a sale of one-half of the Argo to the former for $7,500, and that she was to have been delivered and the money paid for said one-half interest on the day following that on which she was lost and on her return to the city. This was an actual sale in this market, and under the law as declared in "The Atlas," 93 U. S., 310, the libellant is at least entitled to compensation at least this amount.

See also Springer's evidence (p. 181).

Some evidence has been offered to show libellant at one time before she was lost, offered to sell her for $12,000 and allow a commission, but the same evidence (Gen. Miller) shows it was because the libellant had become tired of a yacht and wanted to get rid of her badly, and his own evidence shows it was because he was in need of money, and wanted to avoid the expense of taking her back to Detroit (p. 237). But this is not legal evidence.

From all the evidence we think it will appear that the value of the Argo at the time of her loss was not less than $20,000, for which the libellant should have judgment, with costs.

When we take the various amounts given by each of the witnesses examined and add them together and divide the sum by the number of witnesses examined, the result will show how entirely wrong is the amount awarded by the court. This will appear as follows:

Woodward, - - - - - - - - -	$ 8,500
J. B. Herreshoff, cost, $20,000; depreciation, from one-third to one half, say, - -	11,667
N. G. Herreshoff, cost, $20,000; depreciation, one-third, - - - - - - - -	13,334
Bakcock, - - - - - - - - -	17,500
Cochrane, from $18,000 to $20,000, say, -	19,000
Huettman, from $25,000 to $30,000, say, -	27,500
Tarsney, - - - - - - - - -	18,000
Miller, Thos. E., from $20,000 to $25,000, say,	22,500
Muir gives no valuation, but says the Leila was sold (this before receiving a new hull, deck, etc) from $9,000 to $7,000, say, -	8,000
Delano gives no valuation, but says she was sold for less than her value because of no longer use (this before receiving new hull, etc.) for $7,000, - - - - - -	7,000
Cillman examined her as to value before receiving new hull, etc., when sold to Chicago in 1892, and valued her at $12,000 to $15,000 in 1897, - - - - -	13,500

Thomas examined just before her loss and valued her from $25,000 to $30,000, say,	27,500
Miller says libellant offered to sell her for, -	12,000
Springer valued her at, - - - -	20,000
Bagly closed bargain for half at $7,500, making,	15,000
Total valuation, - - - - -	$241,001

And this sum divided by the total number of witnesses examined (15) gives a valuation of $16,066.73⅓

But if we deduct the amounts given by Muir and Delano, who were not experts in such matters ($8,000 and $7,000, or $15 000) from the above $241,001, we get valuation of $226,001, and this divided by the number of the other 13 witnesses gives $17,384.

In view of the foregoing we assert with confidence that under no system of calculation or reasoning can the amount of $15,000, without interest awarded by the Court of Appeals be sustained as the valuation of the Argo when destroyed by the Dumois on January 28, 1897. No interest was added by that court. Certainly libellant is entitled to interest on his loss from the date of it.

And surely not when the uncontradicted evidence shows one-half of the vessel was actually sold, to be delivered the day after that on which she was lost, at a valuation of $15,000, and in the market where she at the time was, while the best evidence in the case conclusively shows her value at said time was fully $20,000, nothing less would be compensation for her wanton destruction by the Dumois and the loss sustained by the libellant—that compensation which the Supreme Court, in "The Atlas," 93 U. S., p. 310, declared one thus injured was entitled to recover.

Evidently the learned court, in assessing the damages, did not apply the correct rule for finding the value of a vessel lost in a collision, when the vessel is a total loss. The question is, what was the value of the Argo just before the collision? This question cannot be answered by taking the original cost of the Leila and deducting for depreciation occasioned by use and age.

First—Because the Leila, we have shown, when rebuilt and called the Argo, was a better boat than when first built.

Second—Because such method of finding value is applicable only when the vessel lost has been constructed for a special purpose not in the line of ordinary shipping, or when there is no other evidence of value offered to guide the court.

There was nothing peculiar about the construction of the Argo and she was useful for many purposes, as her license and the evidence of Mr. Bagley and Mr. Thomas shows.

It will be admitted that the value of the Argo should be found from the best evidence of that value, and not from the "next best" or the poorest evidence of her value. The best evidence of the value, according to the rule in the Colorado case above quoted, is found in the depositions of T. E. Tarsney, Thos. M. Miller, W. I. Babcock, David M. Cochrane, Frank Huetteman, N. R. Bagley and Capt. A. Thomas. All of these witnesses knew the Argo, testified she was in first-class condition, and gave evidence of her value. Mr. Thomas and Mr. Bagley saw and examined the vessel a few days before or "just before the collision," and they placed her value at $25,000 to $35,000. (Record, pp. 185, 189)

"The correct rule upon this subject when the vessel is a total loss seems to be that the market value of the vessel just before the collision is the proper measure of damages; that the best evidence of such value is the opinion of competent persons who knew the vessel shortly before she was lost, and the next best evidence is the opinion of persons conversant with shipping and the transfer of vessels."

The Colorado 1 Browns Adm. p. 413.

If this rule is applied, as it should be, to the case at bar, the evidence of J. B. and N. G. Herreshoff will be found incompetent and hence should not be received as establishing the value of the Argo. The same thing

may be said of all the evidence intr duced for the claimant on the measures of damages.

Wherefore libellant prays that the decree herein be reversed, and that a decree be rendered in his favor for the full value of said Argo, to wit: $20.000 with interest at five per cent per annum from the date of his loss (January 28th 1897), until paid with all costs of the District Court, the Circuit Court of Appeals and this Honorable Court, and for such other and further relief and redress as to right and justice may appertain and as the Court is competent to give in the premises.

Respectfully submitted.

RICHARD DEGRAY,

Proctor for Oscar M. Springer, libellant.

may be said of all the evidence intr duced for the claimant on the measures of damages.

Wherefore libellant prays that the decree herein be reversed, and that a decree be rendered in his favor for the full value of said Argo, to wit: $20.000 with interest at five per cent per annum from the date of his loss (January 28th 1897), until paid with all costs of the District Court, the Circuit Court of Appeals and this Honorable Court, and for such other and further relief and redress as to right and justice may appertain and as the Court is competent to give in the premises.

Respectfully submitted.

RICHARD DEGRAY,

Proctor for Oscar M. Springer, libellant.

Brief
for
Respondent

Supreme

ANDR

OSCAR M. SPRINGER, Petitioner,

Objections and Answer of Oscar M. Springer to the Petition for a Writ of Certiorari, in the Nature of an Appeal, and Brief in Support to Said Objections and Answer.

RICHARD D

Proctor for Respondent, O. M. Springer.

3rd Objection—Because, if petitioner was ever entitled to said writ now prayed for (which is denied), he has, by his long silence, abandoned the same.

ANSWER.

In case the foregoing objections are not considered good, then respondent answers as follows. He denies all the allegations contained in the petition filed herein, tending in any way to charge the steam yacht Argo with fault in causing the collision therein referred to, and especially does he deny, that just previous to said collision, and when the vessels came in sight of each other, the said Argo was on the Eastern bank of the Mississippi river, or near said bank, and he avers she was in her proper place for a descending vessel, in the middle of the river, and he further denies that said Dumois gave the first signal of two blasts of her whistle, to which the Argo responded by a cross signal of one blast of her whistle, and avers the first signal was given by said Argo of one blast of her whistle and that this was wrongfully crossed by said Dumois by two blasts of her whistle, when said Argo again blew one blast of her whistle and ported her helm to go to starboard, but that said Dumois in utter disregard of the signals of said Argo, and in open violation of Rule 18, of Section 4233 of the Revised Statutes of the United States (being then in full force at the place and the time where said collision occurred) put her helm to starboard, changed her course and shot in front of said Argo, and thereby caused said collision. And he denies that said Dumois stopped her speed before the collision occurred, but wrongfully continued on her changed course under said starboard helm, going clear past said Argo and out of her sight. And further answering respondent says that after said Dumois had wrongfully starboarded her helm and was crossing the course of said Argo, she then had said Argo on *her* starboard bow, and under Rule 19 of

said Section of said Statutes it was then the duty of said Dumois to keep out of the way of said Argo, and in doing so to have ported her helm and passed astern of said Argo, which she did not do, but the contrary, while it was then the duty of said Argo to continue her course or port her helm, both of which she did do, said Argo having first given the proper signal of one blast of her whistle, all in accordance with said Rule 19, and in accordance with the "RULES AND REGULATIONS PRESCRIBED BY THE BOARD OF SUPERVISING INSPECTORS OF STEAM VESSELS, as amended January, 1896," (in force at the time of said collision), p. 79.

And further answering, respondent denies that it ever was necessary for said Dumois to have starboarded her helm and gone out in the river to have cleared said tug Day Dream and her tow of luggers, and avers that there was a full space of 450 or 500 feet between said luggers and the course said Dumois was pursuing, before she attempted to cross the river, and that in no event was it proper to have changed her course across the river and the course of said Argo, but in case Day Dream and luggers were in her way as alleged (which is denied), then she should have stopped and backed until she could have passed in safety, all of which, as well as all the other matters involved in the present application were fully alleged in the petition of the respondent herein in his application for certiorari, and shown in his brief in support thereof, which were duly served on the present applicant and were never noticed by him at the said hearing before this Honorable Court on October 10, 1898.

Wherefore respondent prays that the certiorari prayed for by petitioner be denied with costs.

Respectfully submitted,

OSCAR M. SPRINGER,
By R. DEGRAY, *His Proctor.*

RICHARD DeGRAY,
Proctor.

Richard DeGray being duly sworn deposes and says, that he is proctor for said Oscar M. Springer, who is a non-resident of Louisiana and who resides in the city of Detroit, Michigan, that he has no duly authorized agent or attorney in fact in the city of New Orleans and State of Louisiana to the knowledge of affiant, and that the matters and things set forth in the foregoing answer are true to the best of his knowledge, information and belief.

RICHARD DEGRAY,

Sworn to and subscribed before me this 8th day of April, 1899.

F. H. MORTIMER,
U. S. Commissioner.

Brief in Support of the Foregoing Objections and Answer.

Long before the present application for a writ of certiorari was made, the present petitioner was duly notified, (early in September, 1898) by O. M. Springer, the libellant, that he would make an application to this Honorable Court on October 10th, 1898, for a writ of certiorari, and the present petitioner was served with said Springer's petition praying for said writ and his brief in support of the same, and it was then and there his duty (if any complaint he had against the decree of the Circuit Court of Appeals) to have joined in an application for said writ, setting forth his grounds of complaint. This he did not do, but on the contrary utterly ignored the whole matter, never noticed Springer's application, and by his silence acquiesced in the correctness of the decree of said Court of Appeals, of which he now, long after said writ has been granted on Springer's application, for the first time seeks to complain.

It cannot now be contended in this case that petitioner, by analogy to the law granting appeals, has a full year to apply for said writ. This might be true if the matter of granting said writ had not already been before the Court for its consideration and determ-

ination. We are aware that it was so said in the case of The Conqueror, 166 U. S., p. 110, but in that case no prior application for the writ had been submitted to the Court after due notice, and been considered and decided.

Moreover, the right to an appeal and cross appeal, and the right to a certiorari are entirely different. The right to the former, where the case is appealable, is an absolute right, to which the party is entitled for the mere asking, upon complying with the terms of the statute in such cases made and provided, while the latter is only to be granted after notice, argument by brief, and consideration and determination by the Court, and the Court ought not twice, in the same case to determine—to adjudge—whether the writ should issue or not first for one side, and thereafter by another separate and distinct application determine whether it should issue for the other side, and especially not after the present petitioner has acquiesced in the correctness of the decree of the Court of Appeals since October, 1898, when that precise matter was before this Court on Springer's application, and he has ever since acquiesced in said correctness even up to the present application. To do so would be to allow the opposite side in the first application to take his chances of having the examination of the decree below denied and thereafter to complain of said decree by a subsequent and independent proceeding.

If the above views are not correct then the right to invoke the judicial consideration of the Court on the matter of certiorari in the same case is only to be limited by the number of the parties to the decree who may consider themselves from time to time injured thereby.

And acting on the belief that after the present petitioner failed to notice the application for *certiorari* when the matter was before the Court on October 10, 1898, his right to complain of the decree of the lower Court ceased, the present respondent has prepared his brief and the same is now on file, and only notices the matters

whereof he has complained in his application for *certiorari.*

Surely, inasmuch as the granting of the writ of certiorari requires argument by brief, consideration and determination by the Court, all parties, when the matter is before the Court, should then and there be bound to make all their complaints, if any they have. In other words, all cross applications for certiorari should, in the language of the 22 Rule of this Honorable Court in reference to cross-appeals, "be argued together as one case," not only on the merits, but as well as in granting the writ, for, as before stated, the granting of the writ is not a matter as of course, but a matter that involves argument by brief, and consideration and determination by the Court.

But in addition to the above there is another reason why, in matters of application for writs of certiorari all complaints of the decree of the lower Court, and the propriety of the issuance of the writ should be heard and determined at one time, to-wit: the large amount of costs that are incident to such an application, which is well illustrated in this case, as follows:

When petitioner Springer applied for a certified copy of the record of the United States Circuit Court of Appeals, although it was all in print just as it had been used in said Court of Appeals, with the sole exception of seventeen pages covering the proceedings in said Court of Appeals, he was compelled to pay and did pay the clerk of said Court $257 for said copy, being charged therefor under the provision of the fee bill prescribed by this Honorable Court for said Court of Appeals, reading as follows:

"Entering any rule, *or making* or copying any record or other paper, for each hundred words, 20 cents."

Said Springer also paid as a deposit in this Honorable Court $25 on filing his application, and after the writ was granted, although he furnished IN PRINT twenty-five copies of said record in addition to the ten copies on which his application for said writ was granted,

he paid an additional sum of $295 to the clerk of this Honorable Court, making a total of $577, and in addition to which he has paid other sums for printing for the record now in use. Surely this expense ought not to be duplicated in this case, nor ought the present petitioner, after taking his chances of having the writ denied when applied for by respondent, and then allowed to come in and avail himself of the expenses already paid by respondent, and pay nothing himself. Not only this second and separate consideration and determination of the Court required under the present application would forbid this application, but also the heavy costs that must follow simply because the present petitioner did not ask for the relief he now seeks when the opportunity offered him again.

It seems to us that the reasons given by this Honorable Court for the dismissal of cross-appeals for lack of perfection or prosecution are valuable in considering this (as it were) cross application for a certiorari, made many months after the writ had been granted on the application of the opposite party after due notice, and to which no attention was paid by said opposite party, by entering his appearance, opposing said application, applying for a writ himself or otherwise.

In the case of the "S. S. Osborne," 105 U. S., p. 447 where W. G. Winslow and H. J. Winslow were libellants and B. O. Wilcox was claimant of said steamship, the Court at page 450 said:

"When the decree of the Circuit Court was rendered, both the Winslows and Wilcox appealed to this Court. The Winslows filed the transcript and docketed their appeal here on the 19th of September, 1879, but Wilcox neither entered his appearance as appellant in this Court nor did anything to make himself an actor in reference to his own appeal, until March 23d, 1882, the day before the cause was called for a hearing. Under these circumstances we must decline to consider his appeal. *Grigsby vs. Purcell*, 99 U. S. 505. Rule 9 of this Court requires every plaintiff in error or appellant, on docketing his cause, to have the appearance of counsel entered; and Rule 10, that he secure the costs. Cross-appeals must be prosecuted like other appeals. Every appellant, to entitle himself to be

heard on his own appeal, must appear here as an actor in his own behalf by having the appearance of counsel entered and giving the security required by the rules. Otherwise, if he is here as appellee on the appeal of his adversary, he will be heard only in support of the decree as it was entered below. If he asks affirmative relief beyond what he got below, he must enter himself in this Court in due time as the prosecutor of his own appeal, even though his adversary has docketed the case against him."

In The Tornado, 109 U. S., at page 117, the Court said:

"The final decree of the Circuit Court was entered on the 24th of May, 1880. On the 26th of June following, the underwriters on the cargo filed a petition in the Circuit Court praying a cross-appeal to this Court from the decree, and it was allowed, returnable at the October term, 1880. On the 5th of July following, the bond on the cross-appeal was filed in the Circuit Court. But the appellants in the cross-appeal did not docket it or enter their appearance on it, in this Court, until September 27th, 1883; and the appellees in it are entitled to have it dismissed. *Grigsby vs. Purcell*, 99 U. S. 505; *The S. S. Osborne*, 105 U. S. 447."

It is quite true this Honorable Court has decided in Panama R. Co. vs. Napier Steamship Co., 166 U. S., p. 280, that the writ of certiorari brings up the whole case, but this is only for the purpose of determining whether the matters complained of by the petitioner are well founded in fact or law, and whether the decree complained of ought to be reversed, but it has never been decided that notwithstanding the whole case is brought up by the writ any matters are open to the party not applying for the writ in due time and when the opportunity offered, to be examined by the Court. In fact, directly the contrary was decided in Hubbard vs. Ted, 171 U. S., p. 474.

Respectfully submitted,

RICHARD DEGRAY,

Proctor for Respondent, O. M. Springer.